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October Term, 1993

C & A CARBONE, INC.,  
RECYCLING PRODUCTS OF ROCKLAND, INC.,  
C & C REALTY, INC., and ANGELO CARBONE,  
*Petitioners,*

*v.*

TOWN OF CLARKSTOWN,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT, APPELLATE DIVISION,  
SECOND DEPARTMENT, OF THE  
STATE OF NEW YORK

BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF BOND  
LAWYERS IN SUPPORT OF RESPONDENT

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## I. THE INTEREST OF THE NATIONAL ASSOCIATION OF BOND LAWYERS

The National Association of Bond Lawyers ("NABL") is an organization of lawyers whose practices involve the issuance of debt obligations by state, local and regional governmental entities. NABL's members frequently serve as bond counsel in municipal finance transactions, providing opinions to purchasers of bonds for the benefit of issuing states and political subdivisions that bonds are properly issued and that other governmental actions in connection with a financing are properly authorized and enforceable. NABL's principal functions include the provision of educational programs and activities to clarify and to strengthen the legal basis for municipal finance.

Under federal tax law, solid waste disposal facilities are eligible for tax-exempt financing.<sup>1</sup> Local jurisdictions may choose to own and to operate their own facilities or to contract for the construction and operation of facilities by private parties. In either case, both publicly and privately owned facilities are typically financed through the issuance of tax-exempt bonds. In connection with the development and financing of such facilities local jurisdictions frequently enact waste flow control legislation similar to that enacted by Clarkstown, New York, which is the subject of this case. This type of legislation requires waste collectors to deliver waste from the local jurisdiction to the facility that the jurisdiction owns or has contracted with to provide services to its citizens. Waste flow control legislation is the mechanism through which the local jurisdiction procures disposal services.

Similar patterns of legislation are common in connection with the development and financing of water systems and sewage treatment systems. Such legislation provides the flow of

1. Gross income generally excludes interest on any state or local bond. 26 U.S.C. § 103(a) (1988). This exclusion does not apply to any bond that is a "private activity bond" (as defined in 26 U.S.C. § 141(a) (1988)) which is not a "qualified bond." 26 U.S.C. § 103(b) (1988). The term "qualified bond" includes any "exempt facility bond," which includes any bond whose proceeds are used to provide solid waste disposal facilities. 26 U.S.C. §§ 141(e)(1)(A), 142(a)(6) (1988).

revenues necessary to secure payment of debt service for bonds issued to finance solid waste, water and sewage facilities. This litigation calls into question the enforceability of waste flow control legislation. Reversal of the holding of the New York courts would undermine the security for billions of dollars of bonds<sup>2</sup> and weaken the ability of local jurisdictions to provide essential governmental services to their citizens.

## II. SUMMARY OF ARGUMENT

Petitioners assert that a local law requiring that all waste generated within the boundaries of the enacting jurisdiction be taken to a particular solid waste facility for processing or disposal violates the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8. Under the "dormant Commerce Clause" doctrine, state and local laws which discriminate deliberately against out-of-state goods or services or which adversely affect interstate commerce in a manner clearly disproportionate to the local benefits they provide violate the Commerce Clause.

The Court should affirm the decision of the court below for several reasons. First, the dormant Commerce Clause is inapplicable when Congress has authorized the states to adopt the type of laws at issue. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k (1988), authorizes the adoption of waste flow control legislation to effectuate Congress' mandate that state and local governments be authorized to enter into long-term contracts for the supply of waste to solid waste facilities and that the federal government assist state and local governments in securing the flow of waste to those facilities.

Second, the procurement of waste disposal services by a local government for and on behalf of its citizens has fallen within the power of local governments since the seventeenth century. The Commerce Clause was not intended to usurp this

2. In 1992, state and local jurisdictions in the United States issued \$2,997,500,000 in solid waste bonds. The Bond Buyer, Feb. 1, 1993, at 8A, col. 1. Solid waste bonds are being issued at an even higher rate in 1993, with \$2,009,200,000 issued in just the first half of the year. The Bond Buyer, July 26, 1993, at 10A, Col. 1.

traditional power to provide or to procure exclusive public services in areas affecting public health. This consideration should weigh heavily in favor of upholding waste flow regulation under the balancing test enunciated by the Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Waste flow control legislation is adopted to advance legitimate local public interests: it ensures that all solid waste from the adopting municipality is disposed of in an environmentally sound manner, protects the public health from the threats posed by improper waste disposal services while protecting the public fisc, and serves to compel payments from citizens of the jurisdiction for waste disposal. Such legislation has no discriminatory intent and little impact on interstate commerce. Exclusive municipal provision of disposal services is often necessary to ensure long-term, environmentally sound solid waste disposal. As a means of implementing a municipality's decision to provide exclusive disposal services, waste flow control legislation is the mechanism least disruptive of the waste collection market.

## III. STATEMENT OF THE CASE

### A. The Facts in this Case.

Petitioners challenge the ability of a local government in New York to select and to provide waste disposal services to its residents. New York law authorizes local governments to prepare solid waste management plans providing for the proper disposal of all solid waste generated within their jurisdictions. N.Y. Env'tl. Conserv. Law § 27-0107 (McKinney Supp. 1993). Clarkstown, having been forced by the state to close a landfill it owned and to provide for alternative disposal services, entered into a contract with Clarkstown Recycling, Inc., for the construction and operation of a transfer station. Pet. App. 4a, 35a; J.A. 10, R. 59.

Under this contract, Clarkstown guarantees that at least 120,000 tons of waste will be delivered to the facility each year. *Id.* If the facility receives less than 120,000 tons of waste in a given year, Clarkstown is obligated to pay Clarkstown Recycling \$81 for each ton by which deliveries fall short of the minimum, less the marginal operating costs Clarkstown Recycling would

have incurred to process the missing waste. *Id.* Under this "put-or-pay" contract, to the extent the facility's disposal fee revenue is less than \$9.72 million, Clarkstown is contractually obligated to pay Clarkstown Recycling the difference, less Clarkstown Recycling's marginal costs. *Id.*

To protect the public fisc to the extent feasible and to assure that its contractual obligations would be met, Clarkstown required that its citizens' waste be delivered to the designated facility for a fixed "tipping fee" by adopting Local Law 9 ("Clarkstown Law"), which is the subject of this dispute.<sup>3</sup> Rather than adopting waste flow control legislation, Clarkstown could have purchased trucks, hired employees, collected the waste from its own citizens and delivered it to the transfer station. It could have entered into a contract with a hauler to collect all the waste from its citizens and to deliver it to the transfer station. See N.Y. Town Law §§ 198(9), 221(1) (McKinney 1984). Clarkstown chose instead a mechanism that does not restrict competition in the waste collection market to assure that its decision to procure waste disposal services would be given effect.

Clarkstown's efforts, including both the contract and its waste flow control ordinance, are typical of the measures employed by local governments throughout the nation and throughout the nation's history to provide waste disposal services to their residents.

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3. Section 3 of the Clarkstown Law provides, in part:

C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility . . . or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit . . . .

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than its facilities or sites set forth in Paragraph "C" above.

Town of Clarkstown, N.Y., 1990 Local Laws, No. 9, § 3.C. & D.

## B. The Economic Forces Underlying the Creation of the Waste Disposal Services Market.

Since the colonial era, one of the principal functions of both states and municipalities has been the protection of public health and safety through interrelated regulation of waste handling and disposal and provision of waste collection and disposal services. State and local government regulation and action has largely created and shaped the market for disposal services which Petitioners invoke in support of their Commerce Clause claims. The need for such government regulation and the provision of such public services is created by economic forces directly relevant to the issues in this appeal.

The public health problems caused by accumulations of trash and rubbish are examples of "externalities." The failure of one individual properly to dispose of waste adversely affects the entire community, not just the individual. See Diane Buxbaum & Daniel Baumol, *Service Arrangements for Conventional Disposal*, in *Evaluating the Organization of Service Delivery: Solid Waste Collection and Disposal*, 421, 450 (E. S. Savas and Barbara J. Stevens eds., 1977) (hereinafter *Savas and Stevens*). Conversely, if most individuals dispose of waste improperly, one individual cannot obtain much personal benefit by his or her own proper disposal. Because individual citizens cannot obtain personal benefits or protect themselves from the acts of others by their own actions, their incentives to purchase waste collection and disposal services are limited. It follows that citizens and private collectors will generally be unwilling to pay private disposal contractors for the public health benefits of environmentally sound disposal if less expensive disposal services are available. Disposal contractors, in turn, will be tempted to maximize profits by spending as little as possible on disposal while charging what the market will bear.

Federal and state regulations requiring minimum standards for disposal facilities are an attempt to force disposal contractors to internalize these externalities under threat of penalties or closure. Regulations, however, can only assure that minimum standards are met and do so only at a high cost of enforcement. Frequently "grandfather clauses" in regulations allow less environmentally sound facilities to continue in operation. Moreover,

regulations in some states and localities are much less stringent than those in others. Local jurisdictions are free to provide disposal services with a level of health and environmental protection higher than that required by regulation and to require their citizens to pay the cost by a variety of mechanisms. Waste flow control legislation is one such mechanism.

When a local jurisdiction acts to provide waste disposal services, it provides a "public good." The health and environmental benefit of proper disposal of the majority of waste accrues to each individual whether or not that individual participates. This creates a "free rider" problem, where some individuals fail to participate, assuming that others' actions will provide them with the same benefits. See Franklin R. Edwards and Barbara J. Stevens, *Local Government Regulation of Residential Refuse Collection by Private Firms*, in *Savas and Stevens, supra*. The only way to assure collective benefits is to require participation by all.

Provision of public services may also require coercion to avoid "cream skimming." It may be profitable for private parties to provide disposal services to some customers, for example, large commercial customers or customers in densely populated or wealthy areas, but not to provide them to others.<sup>4</sup> In order to ensure that services are provided to all, it is often necessary to require participation of all in a single disposal scheme. Because of the economic biases arising in connection with the provision of public goods, the market cannot be relied on to provide appropriate disposal services. The first purpose served by waste flow control legislation is to ensure that waste is disposed of at

4. Many recycling programs suffer because profitable aluminum cans are removed by private scavengers from mixed recyclables set out by homeowners, leaving the local jurisdiction with the remainder of the mixed recyclables, disposal of which is far more costly. Similarly, because markets for recycled goods are commodities markets, private scavengers will typically pick up saleable recycled goods only when there is a positive price and leave the very same goods on the curb for the local jurisdiction to handle when market forces result in a "negative" price. Robert B. McKinstry, Jr., Winifred M. Prendergast and Thomas F. Doyle, *Recycling and Waste Reduction: The Other Half of Municipal Waste Management*, in *Municipal Solid Waste Disposal Strategies, Environmental Regulation, and Contracts and Financing* (American Law Institute—American Bar Association 1990).

the facility chosen by a local jurisdiction, and that the public health benefits of proper disposal are thus achieved for all on an equal basis.

### C. The History of Waste Collection and Disposal Services.

The pattern of state legislation and municipal action which Petitioners challenge began in colonial America. Colonial assemblies frequently authorized cities to provide for removal of refuse. These statutes were initially enacted in response to odors and interference with traffic in the streets. A number of such enactments designated or authorized designation of specific disposal sites, thus beginning the practice of waste flow control in what is now the United States.<sup>5</sup>

Open dumping at specified sites and in oceans and watercourses were the earliest disposal solutions. Much recycling was practiced by scavengers, either directly retained or designated, licensed or permitted by local jurisdictions.

5. Colonial laws enacted by or for the cities of New York (as New Amsterdam), Philadelphia and Charleston all included waste flow control measures allowing local officials to require the disposal of waste in a particular location. The South Carolina legislature in 1764 established a street commission for Charleston, and provided it with the power:

to contract and agree with any person or persons, to be scavenger or scavengers, to keep the streets, lanes and alleys, and other parts of said town, clean and in good order and repair; to remove all filth and rubbish, to such proper place or places, in or near the said town, as they shall determine. . . .

Act of August 10, 1764, reprinted in *South Carolina Gazette*, Aug. 25, 1764 (emphasis added). In 1658, in New Amsterdam, "[t]he burgomasters and schepens ordained that all such refuse be brought to dumping-grounds near the City Hall and the gallows or to other designated places." Maud W. Goodwin, *Dutch and English on the Hudson* 105 (1919); see also Christopher Niemczewski, *The History of Solid Waste Management*, in *Savas and Stevens, supra*. Philadelphia was authorized to implement waste flow controls in 1769. Act of Feb. 18, 1769, ch. DXCIV, 1 Laws of Pa. 284, 287, 297, reprinted in the appendix to NABL's Brief (hereinafter "NABL App.") at A-1. It may be reasonably concluded that site designation was a common expedient for dealing with waste accumulations. See Ernest S. Griffith, *History of American City Government, the Colonial Period* 99-125, 258-91 (1938) (Da Capo Press 1972).

In the late 1800's, scientific connections were made between disease and improper disposal of wastes, and the technology of waste disposal began to evolve. The first incinerators appeared during this period,<sup>6</sup> as well as competing rendering technologies. These facilities were mostly privately owned and operated under contract to local jurisdictions. See Melosi, *Out of Sight, supra*, at 625; William W. Locke and Joseph B. Taylor, *Reports on I. Garbage Disposal in the Outlying Wards, II. History of the Garbage Contract, III. Refuse Disposal of Cities* (1896) (available from Univ. of Chicago Library, Preservation Dept., Negative No. N6958). During the same period, centralized municipal recycling and improved municipal waste collection were introduced in New York. Melosi, *supra*, at 626-29. According to a Department of Interior survey of 199 major cities in 1880, 24 percent of cities directly provided collection service, 19 percent contracted for collection service, 30 percent allowed free competition for disposal services and 25 percent used a combination of practices. Martin V. Melosi, *Pollution and Reform in American Cities, 1870-1930*, 108 (1980).

During the first half of the twentieth century, incinerators and open municipal dumps were the predominant means of disposal. Concerns with sanitation and the introduction of closed packer collection trucks reduced or eliminated much reuse and recycling. A 1977 Columbia University survey found that 66.4 percent of cities surveyed used some form of government procured arrangement (not counting franchises) for waste collection, including 89 percent of cities over 5,000 in population. E. S. Savas, *The Organization of Solid Waste Collection: Findings, in Savas and Stevens, supra*, at 58, 83, 87. In a companion survey, Columbia researchers found that 61 percent of disposal facilities were government owned and another 7.4 percent were government operated even though privately owned. Buxbaum and Baumol, *supra*, at 428. A significant number of these facilities were restricted to use solely by one or more local jurisdictions. *Id.* at 431. While private industry has played a significant role in the waste disposal market, public

6. The first was in Allegheny, Pennsylvania in 1885. Martin V. Melosi, "Out of Sight, Out of Mind," *The Environment and Disposal of Municipal Refuse, 1860-1920* (hereinafter Melosi, *Out of Sight*), 35 *Historian* 621, 625 (1973).

procurement of collection and disposal services has clearly been and remains the dominant practice.

In the 1970's, the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988), led to the closure of many municipal incinerators. Those that remained in operation had to be equipped with expensive pollution control equipment. RCRA ushered in intense state and federal regulation of hazardous and solid waste disposal practices. RCRA required the elimination of open dumps and their replacement with sanitary landfills. 42 U.S.C. § 6943(a)(2) (1988). RCRA explicitly recognized the central role of states and localities in providing waste disposal services<sup>7</sup> and required states to adopt regional plans for waste disposal. *Id.* § 6949 (1988).

In response to RCRA's requirements, most states adopted comprehensive solid waste legislation requiring local jurisdictions to plan for ecologically sound, long-term waste disposal and granting new or more explicit powers to local jurisdictions to ensure their ability to carry out their plans. Federal and some state regulators have concluded that various types of resource recovery (including recycling) represent the most desirable disposal alternative. See *id.* §§ 6901(b)(7), 6941-41a, 6943(a) (1988); U.S.E.P.A., *The Solid Waste Dilemma: An Agenda for Action, Background Document* 3.B-1 to 3.C-7 (1988); N.Y. Env'tl. Conserv. Law § 27-0105 (McKinney Supp. 1993). Both RCRA and many state statutes require the implementation of these and other newer and costlier technologies: cleaner incinerators with energy recovery, composting facilities<sup>8</sup> and mechanized recycling facilities.

These new resource recovery technologies are far more capital intensive than the older generation of municipal dumps, and normally require financing over a long term. H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. I, at 34 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6272. Bond issues ranging from \$50 million

7. "[T]he collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies. . . ." 42 U.S.C. § 6901(a)(4) (1988).

8. Composting facilities utilize the organic portion of various waste materials to generate compost which is used as a soil conditioner or potting material. Composting is a form of "resource recovery."

to over \$250 million have been required for construction of state-of-the-art waste-to-energy facilities.<sup>9</sup> Costs of modern landfills have also increased dramatically. Construction of a modern landfill requires construction of a leachate collection and treatment system, a synthetic liner, gas control piping, pumps and flares, and groundwater monitoring equipment. See 40 C.F.R. pt. 258 (1992); N.J. Admin. Code tit. 7, ch. 26, subch. 2A (1993); 25 Pa. Code ch. 273 (1993).

Although many older incinerators and "open dumps" have been forced to close, many other older facilities that meet certain minimal requirements applicable to existing facilities continue to operate under "grandfather clauses" which exempt them from more stringent requirements applicable to new facilities.<sup>10</sup> These grandfathered facilities are not subject to the same capital and operating costs as new facilities and therefore often have a substantial competitive advantage in price.<sup>11</sup> Thus, the solid waste disposal market has become skewed, conflicting with public policy; although RCRA and state laws favor the construction of state-of-the-art facilities, such facilities may be unable to compete against cheaper, less environmentally sound disposal facilities.

9. By way of example, Lancaster County, Pennsylvania, issued bonds in the amount of \$135,600,000 million to finance its solid waste system, while Montgomery County, Maryland, issued bonds in the amount of \$325,985,000 to finance its system. NABL App. A-30, A-4.

10. Although in 1984 Congress required upgraded standards for municipal solid waste landfills, Pub. L. No. 98-616, § 302(a)(1), 98 Stat. 3221, 3267 (1984), codified at 42 U.S.C. § 6949a(c) (1988), those standards were not promulgated until 1991, 56 Fed. Reg. 50978 (Oct. 9, 1991), codified at 40 C.F.R. pt. 258 (1992), and EPA has now proposed to delay the effective date of those regulations. 58 Fed. Reg. 40568 (July 28, 1993). Even when these new standards are in effect, they will apply certain requirements that are critical to environmental protection, such as liners, only to new landfills. See 40 C.F.R. § 258.40 (1992). Thus, unlined facilities built before the effective date of the new regulations will continue, perhaps for decades, to provide cheaper, less environmentally sound alternatives to state-of-the-art facilities.

11. The disposal cost at the new county-owned composting facility at issue in *Waste Systems Corp. v. County of Martin* is \$72 per ton, while the disposal cost at the appellants' grandfathered landfill is only \$30 per ton. 985 F.2d 1381, 1387 (8th Cir. 1993).

Because of competition from these grandfathered facilities, private contractors are generally unwilling to undertake the construction of a new solid waste disposal facility, particularly the statutorily favored resource recovery facilities, unless a minimum amount of income is guaranteed. Waste flow control measures provide this guaranteed level of income in the form of tipping fees for disposal of waste.

#### D. Institutional Means to Provide and To Finance Waste Disposal Services.

As waste disposal facilities have grown more expensive, development and financing of such facilities has grown more complex. To understand the role played by waste flow control legislation, it is necessary to understand its place in the array of institutional mechanisms for development and financing of solid waste facilities.

Profligate municipal financing of private railroads in the nineteenth century led to imposition of statutory or state constitutional limits on the ability of states and municipalities to incur debt and to lend credit. See, e.g., Stephen M. Lounsberry, *The Scope and Basis of the Local Finance Law*, N.Y. Local Fin. Law at VII (McKinney 1968). In many states these limits also restrict the ability of local jurisdictions to enter into long-term contracts. See, e.g., N.Y. Local Fin. Law § 135-3-a, -b (McKinney 1968). Alternative means of financing projects were therefore developed to avoid exposure of municipal credit. These included the use of separately chartered authorities to construct, own or finance projects and payment for services through enterprise funds kept separate from a jurisdiction's general funds.<sup>12</sup> The use of authorities or enterprise funds,

12. For example, in Oregon, long term contracts can be entered into from an enterprise fund but not directly by a municipality. See *DeFazio v. Washington Public Power Supply System*, 679 P.2d 1316 (Or. 1984). Many jurisdictions cannot enter long term contracts that are not subject to annual appropriations, but authorities chartered in the same jurisdiction frequently can. Compare Pa. Stat. Ann. tit. 53, § 306(B)(j) (Purdon 1974) with *id.*, §§ 23308.1, 36901(b), 53202(a), 56802(a), 65802 (Purdon Supp. 1993).

which may have no independent source of revenue, i.e., no taxing authority, led to financing techniques such as rate covenants<sup>13</sup> and put-or-pay contracts.<sup>14</sup>

More recently, in response to the increased capital cost of providing solid waste facilities and RCRA's mandate that states eliminate legal barriers to financing such facilities, 42 U.S.C. § 6943(a)(5) (1988), states have granted local jurisdictions a variety of powers for the specific purpose of providing and financing solid waste services. These include powers to enter into long-term solid waste supply contracts,<sup>15</sup> to enter into put-or-pay solid waste supply contracts,<sup>16</sup> to finance solid waste facilities,<sup>17</sup> to adopt solid waste flow control legislation,<sup>18</sup> to form authorities<sup>19</sup> and to enter into inter-governmental agreements.<sup>20</sup>

Depending on the specifics of local authorization and on technological and political choices, a local jurisdiction may exercise these powers in different ways to assure waste disposal at a facility it has developed or procured. A local jurisdiction may (a) own its disposal site which it may operate itself or

13. A rate covenant is a legally enforceable promise to set rates high enough to pay the costs of a project, including debt service, independent of the level of services provided by the project.

14. A put-or-pay contract is a contract which obligates a local jurisdiction to pay for certain minimum levels of disposal service whether or not those services are actually used.

15. See, e.g., Pa. Stat. Ann. tit. 53, § 4000.304(c) (Purdon Supp. 1993).

16. Power to enter into such contracts without explicit authorization has been called into doubt. *Chemical Bank v. Washington Public Power Supply System*, 666 P.2d 329 (Wash. 1983); *Asson v. City of Burley*, 670 P.2d 839 (Idaho 1983), cert. denied sub nom. *Chemical Bank v. Asson*, 469 U.S. 870 (1984); *Vermont Dept. of Public Service v. Massachusetts Mun. Wholesale Electric Cooperative*, 558 A.2d 215 (Vt. 1988), cert. denied, 493 U.S. 872 (1989).

17. See, e.g., Ind. Code Ann. § 36-9-31-4(a) (Burns 1993).

18. See, e.g., 1991 N.Y. Laws ch. 369, § 1, ch. 540, § 1, ch. 569, § 1, & ch. 631, § 1 (identical provisions); Pa. Stat. Ann. tit. 53, § 4000.303(e) (Purdon Supp. 1993).

19. See, e.g., N.Y. Envtl. Conserv. Law § 27-0107 (McKinney Supp. 1993).

20. See, e.g., Conn. Gen. Stat. § 7-339a (1992).

contract for operation by a third party,<sup>21</sup> (b) take waste to a disposal site pursuant to a contract for its use entered into either through a procurement process or by sole source negotiations, (c) franchise an exclusive disposal site,<sup>22</sup> (d) charter an authority by itself to perform such functions, or (e) together with other jurisdictions, charter an authority or enter into intergovernmental agreements to perform such functions. This range of options allows local jurisdictions to use a wide variety of privately provided services for the construction and operation of disposal facilities. There is an active market with many national and international competitors seeking municipalities as customers to provide such services.

When local jurisdictions procure capital intensive facilities, they often use project financing techniques. These techniques allow debt service for the facility to be spread over a long term and shift many project risks to private participants. In a project financing, project debt is repaid with revenues from the project without recourse to the general credit of the project sponsor. This relieves the sponsoring jurisdiction of the risk of general obligation debt<sup>23</sup> and may permit financing in circumstances where state law would not allow general obligation debt to be incurred.<sup>24</sup>

Because project financings rely on project revenue for the repayment of debt, revenue streams from a project must be

21. In some states municipalities are expressly authorized to acquire existing privately owned facilities by condemnation. See, e.g., Ariz. Rev. Stat. Ann. §§ 9-511, 9-516 (1990).

22. A grant of a franchise will be enforced as a contract in the courts. However, unlike a contractor, the franchisee typically collects fees from users of its services, not payments from the local jurisdiction. Cable television franchising is a familiar example. The grant of an exclusive franchise is typically accompanied by rate regulation. See, e.g., N.J. Stat. Ann. § 48:13A-5 (West Supp. 1993).

23. General obligation debt that is secured by the full faith and credit, i.e., the taxing power, of the jurisdiction. General obligation debt is subject to the debt limits discussed above; nonrecourse debt is not.

24. See C. Baird Brown and Charles S. Henck, *Structuring Municipal Solid Waste Financing*, in *Municipal Solid Waste Disposal Strategies, Environmental Regulation, and Contracts and Financing* (American Law Institute - American Bar Association 1992).

secured for the term of the debt. There are two important sources of revenue for waste disposal projects. One source is sales of resources recovered through the disposal process, such as electricity, steam energy, compost or recycled materials. For all currently available technologies, these revenues are insufficient to support a resource recovery facility. Accordingly, the principal source of revenue for any waste disposal project, and the principal source for repayment of debt, is payments for disposal services.<sup>25</sup>

The payments for disposal services for any waste disposal facility are ultimately made by citizens of the local jurisdiction. Where the municipality provides collection and transportation services, citizens may make general tax payments or special payments for waste collection and disposal services and may make them either directly to the local jurisdiction or to an authority with rate setting powers. Where private collection contractors are used, citizens are generally required either to pay a government-fixed rate to a designated contractor (as pursuant to a franchise), or to make individual arrangements with the contractors of their choice. The collection contractors in turn pay tipping fees for waste disposal services at the disposal facility.

Where the local jurisdiction makes arrangements for the provision of disposal services, tipping fees are paid to or for the benefit of the local jurisdiction. If the local jurisdiction or an authority operates the disposal facility, the tipping fees are set by and paid directly to the jurisdiction or authority. Where a local jurisdiction contracts for a private facility to provide disposal services, minimum revenues from tipping fees are generally guaranteed as part of the contract, which also commonly specifies the tipping fee to be charged. Tipping fees at private facilities operating pursuant to a public contract are usually the property of the local jurisdiction and are placed in a special fund to be used by the local jurisdiction to make its

25. There is no interstate market for unprocessed waste. Rather, there are overlapping interstate markets for various solid waste services, including waste collection, transportation, storage, treatment and disposal services.

contract payments to the operator.<sup>26</sup> In a few cases, the tipping fees may be paid directly for the operator's account, but regardless of the precise arrangement, the payment of tipping fees directly or indirectly offsets the obligation of the local jurisdiction to pay for services under its contract. Waste flow control legislation enables the local jurisdiction to ensure that the tipping fees paid will be sufficient to satisfy its contractual obligations.<sup>27</sup>

Waste flow control ordinances serve other purposes as well. First, by assuring delivery of waste, such legislation assures that the designated facility receives revenues from the sale of recovered resources, *e.g.*, energy or recycled materials, arising from the processing of waste. These revenues are particularly important to the financing of waste-to-energy and composting facilities and will subsidize tipping fees to a limited degree.<sup>28</sup> Second, waste flow control legislation makes possible the public

26. The fund may also be used to pay for waste management administration or other waste system components such as recycling services. Congress encourages such cross-subsidization. See 33 U.S.C. § 1281(e) (1988); 42 U.S.C. § 6948(d)(3) (1988).

27. Petitioners' argument that they should be entitled to compete freely with the Clarkstown Recycling facility to provide waste disposal services is essentially an argument that Clarkstown's power to compel disposal of waste and payment for disposal services must be deployed for its benefit. By analogy, where a local jurisdiction has decided to create a new road, has used its power of eminent domain to condemn a right of way and has selected a contractor to build the road through competitive bidding, a disappointed bidder might argue that it is entitled to force the local jurisdiction to use the power of eminent domain to help it site an alternative road and to help it collect tolls.

28. It would be incorrect to conclude that waste flow control legislation hordes some valuable commodity for the benefit of a local facility and deprives disposal facilities in other states of revenues from recovered resources. Revenues from electricity, steam, compost production, and recyclables do not alone produce positive cash flow for resource recovery facilities; no disposal facility can operate at a profit, even before debt service, without receiving tipping fees. Directing all waste to a designated facility does not have an appreciable effect on commerce, because the recovered resources revenues, by themselves, would not induce any private enterprise to provide disposal services for free. It is only the action of the local jurisdiction to compel payments for disposal services that produces a positive cash flow and creates a market for disposal services.

good of proper waste disposal by allowing a jurisdiction to select a more expensive and environmentally superior facility, such as a statutorily-favored resource recovery facility.

#### E. Related Municipal Services.

The same economic issues that underlie provision of solid waste disposal services underlie provision by local jurisdictions of sewer and water supply services. Local governments generally are authorized by state statute to provide sewage treatment and water supply services to secure public health benefits. They are empowered to *require* participation and payment of service charges by all members of the community served by public facilities or publicly sanctioned private monopolies, even though private services in the form of bottled water, private wells, septic removal and private treatment plants may compete and may be adequate to meet the needs of some. *See, e.g.*, N.J. Stat. Ann. § 40:56-52 (West 1992); *id.* §§ 40A:26A-10 to -14 (West 1993); N.Y. Town Law §§ 198(1)(g)-(k), 201, 202 & 202-a (McKinney 1968); Pa. Stat. Ann. tit. 53, §§ 47043-47064 (Purdon 1966). These mandatory connection and service fees support the financing of the water and sewer systems.<sup>29</sup>

Thus, Petitioners' challenge to exclusive provision of waste disposal services has far wider ramifications than disposal of solid waste. The provision of exclusive sewer and water supply services presents the same policy issues and fact patterns as the provision of waste disposal services, and governmental provision of all such services is called into question. Also called into question is the validity of billions of dollars of financings by local jurisdictions, local and regional authorities and special services districts, the proceeds of which have been used to construct waste disposal facilities, water mains, sanitary sewers, wastewater treatment facilities and sewage sludge disposal facilities.<sup>30</sup>

29. Such fees are mandated where the sewer system has been financed through the Clean Water Act Construction Grants Program. 33 U.S.C. §§ 1281(h)(2), 1284(b) (1988).

30. Wastewater treatment facilities can be integrated with solid waste disposal systems. The Clean Water Act encourages "waste treatment management which results in integrating facilities for sewage treatment and recycling with facilities to treat, dispose of, or utilize other industrial and municipal

## IV. ARGUMENT

### A. Congress Has Authorized State And Local Governments To Impose Waste Flow Controls, Which Are Therefore Not Prohibited By The Dormant Commerce Clause.

The doctrine of the "dormant" Commerce Clause is based on a negative inference arising from the affirmative grant of power to Congress to regulate interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824). "Judicial review of state [laws] under the . . . Commerce Clause is intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised. . . ." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

Where Congress has exercised its authority to regulate interstate commerce to authorize particular state conduct, the states may engage in such conduct without violating the Commerce Clause. Courts "only engage in this [dormant Commerce Clause] review when Congress has not acted or purported to act. . . . Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause." *Id.* Congress may grant authorization to the states to interfere with interstate commerce either expressly or *impliedly*; in either case, the delegation of authority requires "a clear expression of approval by Congress." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984). Congressional consent to state regulation of interstate commerce will be found where Congress has "affirmatively contemplate[d] otherwise invalid state legislation," as evidenced in the statute or legislative history. *Id.* at 91-92. Such affirmative Congressional contemplation of waste flow control is found in RCRA.

As a condition of receiving certain financial assistance, RCRA requires the states to develop and to submit solid waste

wastes, including but not limited to solid waste," and mandates that "[s]uch integrated facilities shall be designed and operated to produce revenues in excess of capital and operation and maintenance costs and such revenue shall be used . . . to aid in financing other environmental improvement programs." 33 U.S.C. § 1281(e) (1988).

management plans to the Administrator of the United States Environmental Protection Agency ("EPA") for EPA's approval. 42 U.S.C. §§ 6946, 6947 (1988). The criteria for approval of these state solid waste management plans include the following "minimum requirements":

(4) The plan shall provide for the establishment of such State regulatory powers as may be necessary to implement the plan.

(5) The plan shall provide that *no State or local government within the State shall be prohibited under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities*, from entering into long-term contracts for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste.

42 U.S.C. § 6943(a)(4), (5) (1988) (emphasis added).

Thus, in these planning requirements, Congress has required that all states examine their laws applying to state and local governments and assure that no state or local laws prohibit these governments from entering into three kinds of "long-term" relationships: (1) long-term contracts for the supply of solid waste to resource recovery facilities; (2) long-term contracts for the operation of resource recovery facilities; and (3) long-term contracts to secure markets for material and energy recovered by resource recovery facilities. It is "unmistakably clear" that Congress intended that states and local governments have the affirmative power and authority to "regulate interstate commerce" to the extent necessary to achieve these purposes. See *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. at 91.

The legislative history of section 4003(a)(5) of RCRA, 42 U.S.C. § 6943(a)(5), demonstrates that Congress intended this provision to force states to remove the institutional barriers to the construction and, in particular, the financing of resource recovery facilities:

[T]o assure the builder of a resource recovery facility that he will have a steady source of garbage and trash in the future, the state plan must provide that no state or local government shall prohibit such local community from entering into long-term contracts to supply discarded materials of the community to resource recovery facilities.

\* \* \*

. . . [M]any cities cannot enter into long-term contracts. Resource recovery facilities cannot be built unless they are guaranteed a supply of discarded material.

\* \* \*

The reasons for this [requirement that state and local laws prohibiting long-term contracts be abolished] are that currently a number of private companies capable of and willing to enter resource recovery ventures if a sufficient volume of refuse can be generated over a sufficiently long period of time [*sic*]. Often municipalities are constrained in their ability to enter long term contracts (5 to 30 years) by their own charters or by state laws. . . . The federal government will not commit technical or financial resources to aid states in the establishment of resource recovery systems if these states maintain barriers to the establishment of such systems.

H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. I, at 7, 10, 34 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6245, 6248, 6272.

Congress understood that resource recovery facilities would not be built unless the financiers of those facilities could be assured of a reliable income stream from waste tipping fees and sales of recovered resources to secure the repayment of the debt incurred to construct the facilities. Congress required in RCRA that state and local governments be able to enter into long-term waste supply contracts in order to secure that reliable income stream. It would be futile to empower a state or local government to enter into such a contract if that governmental unit is constitutionally prohibited from employing means which directly or indirectly require that solid waste generated within that jurisdiction be disposed of at that facility. The authority to direct the flow of solid waste through the adoption of waste flow

control laws is necessary to allow state and local governments to enter into long-term waste supply contracts, and therefore waste flow control laws must be authorized by RCRA.<sup>31</sup> If municipalities are prohibited from adopting waste flow control ordinances, they cannot guarantee to the developers of resource recovery facilities a stable waste stream to provide a stable source of income for the repayment of debt, and resource recovery facilities will not be built.<sup>32</sup>

Congress also expressed the clear understanding that waste flow control legislation was a legitimate and effective means of assuring long-term waste supply already in use at the time RCRA was adopted. Congress expressly acknowledged state authority to adopt waste flow control legislation."

*This prohibition [on state or local laws prohibiting long-term contracts] is not to be construed to affect state planning which may require all discarded materials to be transported to a particular location, nor should this provision be construed to confer upon local authorities substantive rights that would interfere with the states [sic] responsibility for developing and implementing a discarded materials plan.*

H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. I, at 34 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6272 (emphasis added). Congress thus expressed the clear intention not to interfere with then-existing waste flow control legislation.<sup>33</sup> Congress "affirma-

31. The Court of Appeals for the Eighth Circuit has held that RCRA does not authorize the imposition of *waste import restrictions*. In *re Southeast Arkansas Landfill*, 981 F.2d 372, 377 (8th Cir. 1993). In *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993), that court mistakenly held that there is no difference between waste import restrictions and waste flow control laws under RCRA, and followed its earlier holding. 985 F.2d at 1389. RCRA's authorization of long-term waste supply contracts and other institutional arrangements for mandatory waste flow is explicit. The same cannot be said of waste import restrictions.

32. RCRA requires that solid waste management plans provide for "the establishment of such State regulatory powers as may be necessary to implement the plan[s]." 42 U.S.C. § 6943(a)(4).

33. Two years prior to the adoption of RCRA, Wisconsin adopted a statute establishing the Wisconsin Solid Waste Recycling Authority, which was

tively contemplate[d]" that states were and would continue to be authorized to adopt waste flow control legislation, which is nothing more than legislation requiring "all discarded materials to be transported to a particular location."

The Congressional intent to authorize waste flow control by state and local governments was reaffirmed and clarified in the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980).<sup>34</sup> In order to encourage development of resource recovery facilities and to aid communities in solid waste planning, Congress authorized EPA to assist state and local governments in removing "legal, institutional and economic impediments" to the development of resource conservation and recovery systems, including:

(B) impediments to the financing of facilities to conserve or recover energy and materials from municipal waste *through the exercise of State and local authority to issue revenue bonds* and the use of State and local credit assistance; and

(C) impediments to institutional arrangements necessary to undertake projects for the conservation or recovery of energy and materials from municipal waste, including the creation of special districts, authorities, or corporations where necessary *having the power to secure the supply of waste of a project*, to conserve resources, to implement the project, and to undertake related activities.

Pub. L. No. 96-482, § 32(f), 94 Stat. at 2355, *codified at* 42 U.S.C. § 6948(d)(3)(B)&(C) (1988) (emphasis added). The reference to "institutional arrangements necessary . . . to secure the supply of waste to a project" makes it clear that Congress contemplated that state plans would use a variety of mechanisms, not necessarily limited to contracts, to secure waste flow. Congress recognized that "various communities throughout the

authorized to impose waste flow controls requiring use of the Authority's facilities. 1973 Wisc. Laws ch. 305, § 11.

34. By 1980, Delaware and New Jersey had joined Wisconsin in authorizing or implementing statewide waste flow control. Del. Code Ann. tit. 7, §§ 6403-04, 6406(a)(31) (1991); *A.A. Mastrangelo, Inc. v. Commissioner, Dep't of Envtl. Prot.*, 449 A.2d 516, 521 (N.J. 1982).

nation have different needs and different potentials for conserving resources and for utilizing techniques for the recovery of energy and materials from waste." Pub. L. No. 96-482, § 32(a)(6), 94 Stat. at 2353, *codified at* 42 U.S.C. § 6941a(6) (1988). Some communities will need to utilize waste flow control legislation to satisfy their particular economic or social needs.

RCRA's solid waste management planning requirements are imposed on state and local governments. Congress intended to give those state and local governments *all* of the tools needed to establish rational solid waste management planning mechanisms that would lead to the environmentally sound disposal of solid waste in more costly state-of-the-art facilities. 42 U.S.C. § 6941 (1988). In 1976 and again in 1980, Congress expressly authorized state and local governments to enter into long-term waste supply contracts supported by waste flow control legislation.<sup>35</sup> Accordingly, such legislation, including section 3 of the Clarkstown Law, is not subject to challenge under the dormant Commerce Clause.

35. The provisions of RCRA relate to supply of waste to resource recovery facilities and supply of recovered materials. This should not lead the Court to conclude that waste flow control legislation is authorized only to provide a supply of waste for resource recovery facilities. Resource recovery facilities are always built as a part of a larger solid waste system. For example, landfills are *always* needed to receive residue from processing at a resource recovery facility (e.g. ash), non-processable waste, and waste generated during certain periods which exceeds the capacity of the resource recovery facility. Therefore, a long term contract for landfill disposal is a necessary part of resource recovery facility financing. Lancaster County, Pennsylvania, has a solid waste management system based on waste flow control which incorporates both a landfill and a waste-to-energy facility. See NABL App. at A-47; see also NABL App. at A-12. Moreover, as evident from the facts of this case, there is often no clear line indicating whether a solid waste facility is a resource recovery facility. Both facilities here, like many transfer stations, practice resource recovery by removing recyclables. It is for these reasons that Congress required revision of *general* authorization laws to allow states to tailor the requirement to their particular needs rather than passing a preemptive federal law.

## B. Waste Flow Control Legislation Should be Upheld Under The Pike Balancing Test.

### 1. Principles of Federalism Favor Upholding State Authority to Impose Waste Flow Control.

The Framers of the Constitution did not intend that the Commerce Clause would displace the basic local governmental power to provide essential services such as waste disposal. A ruling by this Court invalidating the Clarkstown Law would undermine the basis for exclusive public provision of such public health services. Provision of exclusive services to citizens by local jurisdictions necessarily has an impact on commerce, but it is an impact with which the Framers were familiar and which the Framers must have expected to continue.

American colonial cities had the power to provide waste disposal services and to designate disposal sites. In describing the new constitution, James Madison made it clear that these types of services would not be disrupted:

The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects as war, peace, negotiation and foreign commerce, with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the state.

*The Federalist* No. 45, at 293 (Madison) (Clinton Rossiter ed., 1961). The dormant Commerce Clause doctrine arises from the silent implication that, in granting Congress the power to regulate commerce, the Framers intended that states not exercise concurrent powers which would interfere with the power of Congress. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 203. Clearly, however, the Framers did not imagine that the ordinary and necessary powers of state and local government would be usurped. In *Gibbons*, this Court distinguished between the

power of Congress to regulate commerce and "that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government, [including] health laws of every description." *Id.*

Local jurisdictions provide exclusive waste disposal services to assure public health, because economic analysis and the experience of government has shown that provision of these services is often not safely left to individual incentives. To hold that the dormant Commerce Clause prevents local governments from imposing flow control or otherwise exercising traditional powers to provide exclusive services would turn the structure of the Constitution on its head — making state governments into governments of limited powers and giving the federal government the unlimited and preemptive police power.<sup>36</sup> This was not the Framers' intent.

## 2. Waste Flow Control Legislation Serves Strong Local Interests Which Outweigh Its Effect on Commerce.

These principles of federalism weigh heavily in favor of upholding waste flow control legislation under the balancing test that this Court has applied to state actions affecting commerce, as set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in

36. "If a public enterprise undertakes an integral operatio[n] in areas of traditional governmental functions, the Commerce Clause is not directly relevant." *Reeves, Inc. v. Stake*, 447 U.S. 429, 447-54 (1979) (Powell, J., dissenting) (citing *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976)). In several cases, the Court has enunciated a "market participant" doctrine that protects local governments' power to provide services. See, e.g., *Reeves, supra*; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); and *United Building and Construction Trades Council v. Camden*, 465 U.S. 208 (1984). By providing waste disposal services for its citizens, local jurisdictions undertake integral operations in the area of traditional governmental functions. Enactment of flow control legislation is part of such integral operations.

relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate activities.

397 U.S. at 142 (citations omitted).

Petitioners deny that the *Pike* test should be applied, based on the incorrect assertion that a waste flow control ordinance is a discriminatory ban of the type addressed in *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019 (1992). The Clarkstown Law applies to all waste and all citizens over which Clarkstown has any power, without any discrimination whatsoever; if there is any discrimination it is based upon the limits of the local government's powers. Waste flow control legislation is employed by local governments to enable them to provide and to pay for waste disposal services for their citizens and does not prevent others from using those services on the same terms.

Petitioners' claim that the decision to provide services or to purchase from a single source discriminates is an oddly twisted view of the local jurisdiction's action. Where a jurisdiction decides to arrange for disposal services, it may either decide to hire a single contractor (who often comes from out-of-state and may have a disposal facility located out-of-state) or to provide services itself. In either case, this decision necessarily excludes all other competitors who have not been selected to perform those services, wherever located. Private commercial interests are not treated differently on the basis of their location.

Local waste flow control by one jurisdiction is not the same as a statewide import ban. In *Fort Gratiot*, this Court invalidated Michigan legislation banning the disposal of out-of-county waste without the consent of the county in which the disposal facility is located. 112 S. Ct. at 2028. The Court found that this statewide ban requiring affirmative consent of counties was no different from New Jersey's statewide ban requiring consent of the state. *Id.* By contrast, New York's authorizing

legislation,<sup>37</sup> which has not been challenged, does not designate any location for disposal, in state or out-of-state, and does not impose any statewide controls.

Accordingly, the balancing test articulated in *Pike* should be applied in this case. Waste flow control legislation in general, and the Clarkstown Law in particular, should be upheld under that test. Waste flow control advances legitimate state and local purposes. Any burden imposed on interstate commerce by such legislation is not "clearly excessive in relation to the putative local benefits." Other means of achieving those purposes do not have a less adverse effect upon the various overlapping interstate waste disposal service markets which are affected.

Waste flow control legislation serves two predominant purposes. First, it serves to assure the public health and environmental benefits by requiring waste disposal in selected facilities which maximize resource recovery, serve all of the people all of the time, and employ greater pollution controls than those meeting the lowest standard for existing facilities imposed in the state with the least stringent regulations. Second, it serves as a mechanism for requiring payments for disposal services by citizens of a jurisdiction.

Petitioners' arguments against flow control do not address this first purpose. Petitioners' argument with respect to the second purpose — that measures to protect the public fisc amount to economic protectionism — is misplaced. The measures that this Court has struck down as economic protectionism have generally been measures to shield local *private* businesses from interstate competition. See, e.g., *Hunt v. Washington*

37. The enabling legislation for Rockland County provides: [T]he county of Rockland and all municipalities within the county . . . shall have the power to adopt and amend local laws, ordinances and regulations imposing appropriate and reasonable limitations on competition with respect to collecting, receiving, transporting, delivering, storing, processing or disposing of solid waste or the recovery by any means of any material or energy product or resource therefrom, including . . . local laws requiring that all solid waste generated, originated or brought within their respective boundaries . . . shall be delivered to a specified solid waste management-resource recovery facility . . . . 1991 N.Y. Laws ch. 569, § 1.

*State Apple Advertising Commission*, 432 U.S. 333 (1977). Measures employed to assure that *public* monies are not wasted or *public* credit overextended clearly serve legitimate local public interests.<sup>38</sup>

In serving legitimate local interests, waste flow control legislation does not discriminate in either intention or effect. The local jurisdiction may exercise its power to designate an out-of-state facility as well as an in-state one. Designation of a transfer station, as in the case of the Clarkstown Law or the ordinance at issue in *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988), may, in fact, facilitate ultimate disposal in out-of-state facilities. A local jurisdiction providing disposal services discriminates only in the trivial sense that by choosing to provide one form of disposal it excludes all others, both in-state and out-of-state. Although particular interstate competitors may be displaced, so are all competitors. If this can be viewed as an effect on interstate commerce, it is only an incidental effect of the traditional governmental power to provide exclusive disposal services. More importantly, waste flow control legislation affects in-state and out-of-state interests equally.

Waste flow control legislation also passes muster under the second prong of the *Pike* test, in that its burden on interstate commerce is not clearly excessive in relation to the benefits to be achieved. Both economic analysis and the experience of

38. Petitioners' arguments confuse the concept of simple economic protectionism with that of laws aimed at serving legitimate local economic interests. Promotion of economic interests is a legitimate purpose. In *Pike*, 397 U.S. at 143, this Court recognized that even laws promoting local private economic interests could be legitimate. The fact that the interest promoted is "local" — viz restricted to the jurisdiction enacting the law — obviously could not render the purpose "protectionist." All state and local laws must, by necessity, serve interests within the state or locality. The Court has recognized this fact by referring to a "legitimate local interest" in its formulation of the *Pike* test. This Court, in *Maine v. Taylor*, 477 U.S. 133, 148 (1986), described laws promoting economic interests which should be deemed protectionist as those "motivated solely by a desire to protect local industries from out-of-state competition." This Court found that the critical question to be addressed in determining whether a law is discriminatory or protectionist is whether "out-of-state residents were forced to bear the brunt of the conservation program for no apparent reason other than that they lived and voted in other States." *Id.* at 149, n.19.

government teach us that unregulated, private decision-making by waste generators or waste collectors cannot assure sound disposal. Private competition will tend to produce a race for the lowest priced legal means and a strong temptation to the illegal. Moreover, enforcement is far more difficult with neither centralized disposal nor exclusive collection as a check on illegal practices.

Alternative means to achieve the purposes of waste flow control would be more destructive of interstate commerce in the market for waste collection services. This is evident from consideration of the various alternatives whereby a local jurisdiction may ensure delivery to its chosen disposal facility. It may: (a) collect its own waste and deliver it to the disposal facility; (b) contract with haulers to collect waste and require delivery of waste to the facility by contract; (c) franchise haulers on an exclusive or non-exclusive basis to collect waste and require delivery of the waste to the facility as a term of the franchise; or (d) adopt a waste flow control ordinance. Of these alternatives, public collection eliminates private collection entirely. Contracting or the use of an exclusive franchise will reduce the collection market to a single choice and may not be available to some jurisdictions under their authorizing legislation or charters. A system of non-exclusive franchises is functionally equivalent to waste flow control, with an ordinance requiring a franchise, and contractual provisions requiring the use of the designated facility. By contrast, with a waste flow control ordinance, multiple haulers may compete. Many hauler firms operate in interstate commerce and waste generators are free to make whatever contractual relationships they wish with their haulers. Free competition and interstate competition in this market are maintained. Only the location of the disposal facility is mandated — a result that would flow from any of the foregoing alternatives.<sup>39</sup>

39. For example, as reflected in its solid waste management plan, NABL App. A-52, Lancaster County, Pennsylvania, had a tradition of providing publicly owned landfill disposal services while relying upon private, unregulated collection and transportation services. When the County decided to replace its outdated landfill with a state-of-the-art resource recovery facility and modern lined landfill, to secure financing the County selected waste flow control legislation in order to disrupt the existing private collection market as little as feasible. NABL App. A-65, A-66; see also NABL App. A-42.

In addition, the local jurisdiction may use fees for services or tax revenues that it collects directly to subsidize services or to provide free services at its chosen facility so that collectors, while not legally compelled, are presented with an irresistible market alternative.<sup>40</sup> Petitioners suggest that this is less restrictive, because collectors are not legally compelled to use the jurisdiction's chosen facility. However, although subsidies are different from waste flow control legislation in form, they are not different in substance. A subsidy that is high enough will have the same effect on interstate commerce as waste flow control legislation, but will not protect the public fisc and will discourage recycling and waste minimization.

Building a facility, charging a price that reflects the cost of the facility, and simply hoping that waste will be disposed of there does not represent a real alternative. It does not provide the public good of assuring sound disposal methods,<sup>41</sup> and it improvidently commits a community's resources to provide services that may not be used. A facility in most cases could not be financed on this basis without a commitment of the local jurisdiction's full faith and credit to repayment of the debt. A local jurisdiction, in many cases, would not be empowered to incur general obligation debt for such a speculative endeavor.

Accordingly, even if this Court does not find waste flow control legislation to be authorized by RCRA, waste flow control legislation is consistent with the requirements of the Commerce Clause under the *Pike* test. It achieves legitimate state and local purposes without a disproportionate adverse effect upon interstate commerce.

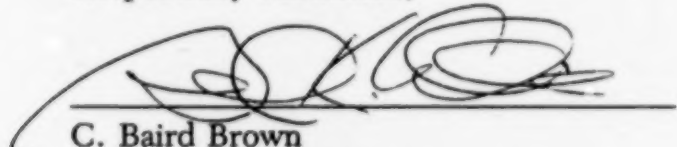
40. This procedure is clearly authorized in some jurisdictions, while in others taxing power may not be available to back up a long-term contract obligation. The power to subsidize waste disposal activities on behalf of in-state residents was upheld by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Montgomery County, Maryland has begun to implement such a system. See NABL App. A-18.

41. There is evidence in the record to suggest that Petitioners' facility, unlike Clarkstown's facility, is less than state-of-the-art. Petitioners acknowledge that if their facility were in operation today, it would be subject to more stringent regulations. See *Clarkstown v. C & A Carbone*, 587 N.Y.S.2d 681, 682 (N.Y. App. Div.), *app. denied*, 605 N.E.2d 874 (N.Y. 1992), *cert. granted*, 113 S. Ct. 2411 (1993).

## V. CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the New York courts on two grounds. First, waste flow control is authorized by Congress in RCRA. Second, waste flow control is integral to the exclusive provision of essential governmental services by states and local governments as contemplated by the Constitution, and is constitutional under the test formulated in *Pike* because it serves legitimate purposes without a disproportionate adverse effect upon interstate commerce.

Respectfully submitted,



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## APPENDIX

From Laws of the Commonwealth of Pennsylvania

CHAPTER DXCIV.

*An ACT for regulating, pitching, paving and cleansing, the highways, streets, lanes and alleys; and for regulating, making and amending the water courses and common sewers, within the inhabited and settled parts of the city of Philadelphia; for raising of money to defray the expenses thereof; and for other purposes therein mentioned.*

WHEREAS the paving the streets, lanes and alleys, within the inhabited and settled parts of the city of Philadelphia, so far as they have been already paved, and the keeping the same clean, hath greatly contributed to the preservation of the health of the people inhabiting therein, and resorting thither; And whereas the law for effecting these good purposes is near expiring, and divers streets, lanes and alleys, within the said city remain yet unpaved;

\* \* \*

VII. *And be it enacted*, That the said commissioners, or a majority of them, from time to time, shall employ, hire, and agree with proper capable persons to clean, the cart-way of the said streets, lanes and alleys, which have been heretofore, or shall be so paved as aforesaid, and to remove and carry off from thence all mud, dirt and other filth there found, that shall or may incommode the inhabitants, in such manner and form, and at such time or times, as they, the said commissioners, or a majority of them, with the Mayor or Recorder, and any four of the Aldermen aforesaid, shall direct and appoint; which said persons, so agreed with and employed, shall take upon themselves the office and duty of scavengers, pursuant to their respective agreements aforesaid, under the penalty of five pounds for every neglect or refusal; and if any such scavenger shall neglect or refuse to carry off and remove all and every part of the mud, mire, dirt and other filth, found in the streets, lanes and alleys aforesaid, agreeable to his contract with the said commissioners, he shall forfeit and pay any sum, not exceeding twenty shillings for every such offence.

VIII. *And be it further enacted*, That the inhabitants and occupiers of the houses and lots, and the sextons, porters, or

other keepers of churches, meeting-houses, academies, schools, and other public buildings, and burying-grounds, fronting the paved streets, lanes and alleys, within the said city, shall rake and sweep into the cartway the dirt, soil and other filth, to be found on the brick pavement or foot-way before their respective houses, lots or dwellings, or cause the same to be done, once at least in every week; that is to say, on every Friday, when the snow or ice on the said pavements does not prevent, that it may be removed by the said scavengers on the same day, or the day following, under the penalty of any sum, not exceeding five shillings, for every neglect or refusal.

IX. *And be it further enacted*, That no person or persons whatsoever shall cast or lay, or cause to be cast or laid, any shavings, ashes, dung, or other filth or annoyance, on any pavement within the said city, under the penalty of any sum, not exceeding twenty shillings, for every such offence; but every such person and persons, having such shavings, ashes, dung, or other filth, shall keep the same in some other place, until the scavenger shall attend with his cart to carry off the same, which he is hereby enjoined to do once in every week, at least, if required, at the door of every such person, under the penalty of five shillings for every refusal, and to take and receive the same into his cart, and to remove the same out of the inhabited parts of the said city, under the penalty of five shillings for every neglect or refusal; *Provided always, and be it enacted*, That every such person having such mud, dung, ashes or other filth, so to be carried off, shall pay to every scavenger, for all such filth, and no other, as shall be occasioned by or arise from his particular trade, business or occupation, and is not incident to common house-keeping, at such rate as shall be from time to time settled and ascertained by the said commissioners, unless he, she or they shall choose to carry off the same at his, her or their own expense, in another manner.

\* \* \*

XXX. *And be it further enacted*, That if any person or persons shall, after the publication of this act, cast or throw down, out of any cart, waggon or other carriage, any rubbish, dirt or earth, in any public street, lane or alley of the city of Philadelphia, save only in such parts and places as shall be

appointed and agreed on by the said commissioners for pitching and paving the said streets, every such person or persons shall forfeit and pay, for every such offence, the sum of five shillings, and pay the costs of removing the same . . . .

\* \* \*

1 Laws of the Commonwealth of Pennsylvania 284, 287-88, 297.

Excerpts from  
**OFFICIAL STATEMENT**  
**\$325,985,000**  
**NORTHEAST MARYLAND**  
**WASTE DISPOSAL AUTHORITY**  
**SOLID WASTE REVENUE BONDS**  
**(MONTGOMERY COUNTY**  
**RESOURCE RECOVERY PROJECT)**  
**SERIES 1993A**  
**INTRODUCTION**

### General

This Official Statement, the cover page (excluding prices and yields) and appendices set forth certain information for use in connection with the offering of \$325,985,000 aggregate principal amount of Solid Waste Revenue Bonds (Montgomery County Resource Recovery Project), Series 1993A (the "Series 1993A Bonds") of the Northeast Maryland Waste Disposal Authority (the "Authority"). The Series 1993A Bonds are to be issued pursuant to the Northeast Maryland Waste Disposal Authority Act, being Title 3, Subtitle 9, of the Natural Resources Article of the Annotated Code of Maryland (the "Act") and the Indenture of Trust, dated as of March 1, 1993 (the "Indenture"), between the Authority and Signet Trust Company, as Trustee (the "Trustee").

\* \* \*

### Purpose of Issue

The proceeds of the Series 1993A Bonds will be used to finance a portion of the costs of the Authority's solid waste disposal project (the "Project"), which includes (a) a mass-burn resource recovery facility to be located in Dickerson, Maryland with a design capacity of 1,800 tons-per-day (the "Facility"), (b) improvements to an existing transfer station (the "Transfer Station") owned by Montgomery County, Maryland, and (c) an

intermodal solid waste transportation system (the "Transportation System") utilizing primarily rail transportation.

The Authority also expects to issue its Solid Waste Revenue Bonds (Montgomery County Resource Recovery Project) Taxable Series 1993B under the Indenture in the aggregate principal amount of \$34,660,000 (the "Series 1993B Bonds") simultaneously with the issuance of the Series 1993A Bonds. The proceeds of the Series 1993B Bonds, together with investment earnings, will finance the remaining costs of the Project. The Series 1993B Bonds are not offered by this Official Statement. The Series 1993A Bonds and the Series 1993B Bonds are collectively referred to as the "Series 1993 Bonds." The Series 1993 Bonds together with all additional bonds issued under the Indenture are collectively referred to as the "Bonds." All Bonds will be secured by the pledge of Project Revenues as provided in the Indenture.

In addition to paying the costs of constructing and equipping the Project, the Series 1993 Bond proceeds will be used to fund (1) a Debt Service Reserve Fund for the Series 1993A Bonds in an amount equal to the Debt Service Reserve Fund Requirement for the Series 1993A Bonds, (2) capitalized interest on the Series 1993 Bonds, (3) the repayment to the County and the Authority of previously-expended Project development costs and payment of certain Project development fees and expenses of the County and the Authority, (4) the costs of certain improvements required by the Potomac Electric Power Company ("PEPCO") under the Facility Site Agreement (described herein), and (5) certain costs of issuance of the Series 1993 Bonds. The Series 1993B Bonds are not secured by the Series 1993A Bonds' Debt Service Reserve Fund.

The Project will be owned by the Authority, which will provide certain solid waste disposal services to the solid waste management system (the "County System") of Montgomery County, Maryland (the "County"), pursuant to a long-term agreement between the County and the Authority (the "Waste Disposal Agreement"). Pursuant to a long-term service agreement with the Authority (the "Service Agreement"), the Project will be designed, built and operated by Ogden Martin Systems of Montgomery, Inc. (the "Company"), an indirect subsidiary of

Ogden Corporation. In order to guarantee the Company's obligations under the Service Agreement (including the Company's obligation to make damage payments), Ogden Corporation has entered into a Guaranty Agreement (the "Guaranty Agreement") in favor of the Authority. The Waste Disposal Agreement obligates the County to make monthly service fee payments solely from its Solid Waste Collection and Disposal Fund (the "Solid Waste Enterprise Fund") for solid waste disposal services provided by the Authority sufficient to pay the Authority's net cost of operation of the Project (a component of which is debt service on the Bonds), except that under certain circumstances, all or a portion of these payments need not be made by the County when the Company is required to make damage payments under the Service Agreement; these damage payments are required to be in an amount sufficient to provide for the timely payment of debt service on all (or the applicable portion) of the Bonds. See "Sources of Payment and Security for the Bonds - Sources of Project Revenues."

The County has entered into a Master Authorization containing covenants relating to the financial and operational management of the County System and the Solid Waste Enterprise Fund (the "Master Authorization"). The Waste Disposal Agreement is a Long Term Obligation authorized to be entered into by the County by its Master Authorization which is incorporated in the Waste Disposal Agreement. The County may issue other Long Term Obligations in accordance with its Master Authorization, and Long Term Obligations will be payable pursuant to the Master Authorization on a parity basis with amounts payable by the County to the Authority under the Waste Disposal Agreement. On June 4, 1992 the County issued \$34,365,000 of its Solid Waste System Revenue Bond Anticipation Notes Series A and Series B (the "System Bond Anticipation Notes") to finance the cost of a materials recovery facility and certain other capital costs of the County System. The System Bonds Anticipation Notes mature on June 1, 1993. The County expects to refinance the System Bond Anticipation Notes and finance certain other capital costs of the County System by issuing long-term County System revenue bonds (the "1993 System Bonds") in an aggregate principal amount of approximately \$51

million in accordance with the requirements of the Master Authorization. The 1993 System Bonds will be Long Term Obligations. The 1993 System Bonds will be issued by the County on or about the date of the issuance by the Authority of the Series 1993 Bonds, but are not offered by this Official Statement.

### Project Participants

*The Authority.* The Authority was established in 1980 to assist participating political subdivisions within the State of Maryland with waste management and the development of solid waste recycling and disposal facilities. The Authority's four original participating subdivisions, the City of Baltimore, Baltimore County, Anne Arundel County and Harford County, were joined in 1987 by the County. The Authority has developed three major solid waste disposal facilities: (1) a 2,250 ton-per-day resource recovery facility in the City of Baltimore, which serves the City of Baltimore and Baltimore County, (2) a 55,500 ton-per-year sewage sludge composting facility in the City of Baltimore, and (3) a 360 ton-per-day resource recovery facility in Harford County. The Authority also assists its members with the implementation of regional recycling programs and has developed State-mandated recycling plans for the City of Baltimore, Baltimore County and Anne Arundel County. For further information about the Authority, see "The Authority."

*The County.* Montgomery County, Maryland is located adjacent to the nation's capital, Washington, D.C., and consists of 495 square miles of land area and a total population (from the 1990 census) of 757,027. The County is responsible under Maryland law for assuring that adequate facilities exist for the disposal of solid waste generated in the County. Since 1943, the County has provided a County-wide system for the disposal of solid waste and in 1976 established its Solid Waste Enterprise Fund to account for the revenues and expenses of the County System. For further information about the County System, see "County System." According to a 1992 United States Department of Commerce survey, the County ranks eighteenth highest in 1990 per capital income among the 3,106 counties and

county-equivalents covered by such survey. The County government consists of a legislative branch governed by a nine-member elected County Council (the "County Council") and an executive branch headed by an elected County Executive (the "County Executive"). For further information about the County, see Appendix M.

*The Company.* The Company, a Maryland corporation, was formed in 1989 and is a wholly owned subsidiary of Ogden Martin Systems, Inc. ("Ogden Martin"), a Delaware corporation. Ogden Martin holds the rights to the Martin GmbH für Umwelt- und Energietechnik ("Martin GmbH") technology for solid waste disposal and energy recovery on an exclusive basis in the United States, Mexico, Canada, parts of the Caribbean and Israel. Ogden Martin is a wholly owned subsidiary of Ogden Projects, Inc. ("OPI"), a public company organized under the laws of the State of Delaware. Ogden Corporation currently owns approximately 84.7% of OPI. OPI, through Ogden Martin, is a leading developer of waste-to-energy facilities in the United States. OPI currently has 23 waste-to-energy facilities in operation (seven of which do not use the Martin GmbH technology) and three facilities under construction. Ogden Corporation, a Delaware corporation, is engaged in providing a variety of services through corporate subsidiaries concentrating primarily on waste-to-energy services, the environmental and energy services area, and entertainment and aviation services. For further information about the Company, Ogden Martin, OPI and Ogden Corporation, see Appendix L.

*PEPCO.* Electricity generated by the Facility will be sold to PEPCO pursuant to the Electricity Sales Agreement. PEPCO, which was incorporated in the District of Columbia in 1896 and in the Commonwealth of Virginia in 1949, is engaged in the generation, transmission, distribution and sale of electric energy in the Washington, D.C. metropolitan area. PEPCO's retail service territory includes the District of Columbia and major portions of Montgomery and Prince George's counties in suburban Maryland. The retail service territory served covers approximately 640 square miles and has a population of approximately 1.9 million. The executive offices of PEPCO are located

at 1900 Pennsylvania Avenue, N.W., Washington, D.C. 20068. For further information about PEPCO, see "PEPCO."

### Feasibility Report

The Authority has retained R. W. Beck and Associates ("R. W. Beck") on a non-contingent basis to assess the technical, environmental and economic aspects of the Project and the other components of the County System. R. W. Beck has reported its conclusions with respect thereto in the Independent Consulting Engineer's Report (the "Feasibility Report"), a copy of which is included in this Official Statement as Appendix A. The estimates, opinions and conclusions expressed in the Feasibility Report are based on assumptions and calculations set forth or described therein. The Feasibility Report should be read in its entirety in order to evaluate such assumptions and calculations. Further information about the Feasibility Report is contained under the caption "Feasibility Report."

### Project Agreement Obligations

The Series 1993 Bonds and all Additional Bonds issued under the Indenture are limited obligations of the Authority payable solely from the Authority's Project Revenues (hereinafter defined) and certain amounts available under the Indenture, including certain proceeds of the Series 1993 Bonds. The Bonds are not payable from the general funds of the Authority and do not constitute a legal or equitable pledge of, or lien or encumbrance upon, any of the assets or property of the Authority or upon any of its income, receipts or revenues, except as provided in the Indenture. The Bonds do not constitute a debt, liability or pledge of the faith and credit of the State or any political subdivision, including the County. Neither the State nor the Authority nor any political subdivision of the State, including the County, shall be obligated to pay the principal of, or redemption premium, if any, or interest on, or the purchase price of, the Bonds except from the Project Revenues and the other amounts pledged therefor under the Indenture. Neither the faith and credit nor the taxing power of the State or the Authority or any political subdivision of the State, including the

County, is pledged to the payment of the Bonds. The issuance of the Bonds is not directly or indirectly or contingently an obligation, moral or other, of the State, or the Authority or any political subdivision of the State, including the County, to levy any tax or make any appropriation for their payment. There is no provision for appropriations for the benefit of the Authority by the State. The Authority has no taxing power. The Authority has no claim with respect to the Bonds on any revenues or receipts of the State or any agency or political subdivision thereof, except its rights to receive payments from the County pursuant to the Waste Disposal Agreement and its rights arising as an obligee under a Long Term Obligation under the Master Authorization.

The Authority's Project Revenues generally consist of (1) amounts paid by the County from its Solid Waste Enterprise Fund to the Authority for services provided pursuant to the Waste Disposal Agreement, (2) payments by PEPCO to the Authority pursuant to the Electricity Sales Agreement for electricity generated and electrical capacity made available by the Facility, (3) amounts (generally, damage or indemnification payments) which may be paid to the Authority or the Trustee by the Company under the Service Agreement or by Ogden Corporation under the Guaranty Agreement, (4) the Authority's share of the revenues from the sale of Recovered Materials, and (5) certain other receipts of the Authority attributable to the Project, including insurance proceeds and investment earnings on funds (other than the Designated Bonds Fund) held under the Indenture. For a discussion of certain exclusions from Project Revenues, see "Sources of Payment and Security for the Bonds — Project Revenues Defined" and "— Designated Bonds." Under the Waste Disposal Agreement, the Waste Disposal Fee payable by the County is intended to cover the aggregate costs of the Authority with respect to the Project, a component of which is debt service on the Bonds. It includes a credit to the County for PEPCO payments, Recovered Materials revenues received, investment earnings and damage payments made to the Authority pursuant to the Project Agreements. Under the Indenture, the Authority will assign certain of its rights under the Project Agreements to the Trustee for the benefit of the

Bondholders, but will not grant for the benefit of the Bondholders a mortgage on the Project. See "Sources of Payment and Security for the Bonds — Pledge of Project Revenues."

The liability of the County under the Waste Disposal Agreement to pay for services rendered by the Authority to the County thereunder is a limited obligation of the County payable solely from amounts in the Solid Waste Enterprise Fund available for such purposes pursuant to the Master Authorization. This liability does not obligate payment from the general fund of the County and does not constitute or create a legal or equitable pledge of, or lien or encumbrance upon, or claim against, any of the assets or property of the County or of its income, receipts or revenues, except amounts available in the Solid Waste Enterprise Fund pursuant to the Master Authorization. Subject to prior payment of certain operating costs of the County System, the County has provided for the pledge of certain County System revenues (as described below, the "System Revenues") for the payment of certain long term obligations (the "Long Term Obligations"), including the Waste Disposal Agreement. See "Introduction — Solid Waste System — County System Expenses." If the County defaults in its obligation to pay the Waste Disposal Fee, the Indenture precludes the Authority from terminating the Waste Disposal Agreement and requires the Authority to bring appropriate legal actions (including mandamus) to require the County to fulfill its obligations under the Waste Disposal Agreement, including the obligations of the County under the Master Authorization.

\* \* \*

The Authority will make the entire disposal capacity of the Facility available to the County System pursuant to the Waste Disposal Agreement and will sell the entire net electrical output of the Project to PEPCO pursuant to the Electricity Sales Agreement. The ability of the Authority to generate sufficient Project Revenues to pay the expenses of the Project and debt service on the Bonds depends in part upon (i) the ability of the Authority to perform its obligations under the Waste Disposal Agreement and (ii) the ability of the County to generate sufficient System Revenues to make payments from the Solid Waste Enterprise Fund for all System Expenses, including amounts due under the Waste Disposal Agreement.

### **Solid Waste System**

*General.* Under Maryland law, the County is responsible for the long-term planning of adequate facilities for the disposal of solid waste generated in the County. The County at present provides for the disposal or recycling of solid waste generated in the County through the operation of the County System, an integrated solid waste management system which includes the Transfer Station, the Dickerson Composting Facility (the "Composting Facility"), a materials recovery facility (the "MRF"), a landfill (the "Oaks Landfill") and source reduction and recycling programs. The County System will be expanded to include the Project and a new landfill located near the Facility (the "Site Two Landfill").

*Statutory Framework.* Chapter 48 of the Montgomery County Code 1984, as amended ("Chapter 48") provides the County's statutory framework for the County System. Chapter 48 governs many aspects of solid waste collection and disposal in the County and includes provisions relating to: the establishment and maintenance of public and private disposal facilities; the establishment of service districts, such as the existing service district in the southern part of the County servicing residences with six or less dwelling units (the "Collection and Disposal District"); the licensing of all waste collectors in the County; the establishment of recycling programs and facilities; and the creation of a solid waste advisory committee. The County has

also enacted a comprehensive zoning and land use regulatory scheme, applicable throughout the County (except for certain municipalities specified in Chapter 59 of the County Code) which limits the zones available in the County for the siting of private solid waste management facilities.

*County Ten Year Plan.* In accordance with the requirements of Maryland law, the County has adopted a County Comprehensive Solid Waste Management Plan (the "County Ten Year Plan"). The County Ten Year Plan provides for the management of all solid waste generated in the County through the following methods (in order of priority): waste reduction; recycling; incineration of waste that cannot be recycled; and landfilling of waste that cannot be recycled or incinerated. Pursuant to the County Ten Year Plan, the County has designated the Facility as "the central facility" for the disposal of municipal solid waste generated in the County. In addition, the County Ten Year Plan provides for other County System disposal and recycling facilities, including the Site Two Landfill and the MRF. Except for short-term, out-of-County haul arrangements prior to the completion of the Site Two Landfill or another in-County landfill, the County Ten Year Plan makes no provision for the use of out-of-County municipal solid waste disposal facilities. As required by the Maryland Solid Waste Plan Act, the County Ten Year Plan has received all required approvals from the State or has as a matter of law been deemed to be approved. The 1992 amendments to the County Ten Year Plan have been approved by the State.

*Solid Waste Enterprise Fund.* The Solid Waste Enterprise Fund is an enterprise fund established by County law to account for all revenues and expenditures of the County System. Under County law, the County must maintain and manage the Solid Waste Enterprise Fund so that revenues equal expenses; provided, however, that contributions from the general fund of the County may be (but are not required to be) appropriated by the County Council to fund a portion of the costs or to cover emergency needs, unusual capital expenditures or unplanned deficits not covered by adjustments of collection and disposal fees. No such contribution has been made or been requested to date. Chapter 48 provides that to the extent that annual

expenses exceed or are less than annual revenues, solid waste collection, and disposal charges (described below) shall ordinarily be adjusted at least annually to fund such deficits or to utilize such surpluses. However, retention of surpluses over a multi-year period is permitted when necessary to fund estimated future expenses or to provide funding for future anticipated short term deficits. As of June 30, 1993, the Solid Waste Enterprise Fund is projected to have an available cash balance (unencumbered assets which are available for the timely payment of obligations) of approximately \$32 million.

*Master Authorization.* In order to secure the timely payment of amounts owed under the Waste Disposal Agreement and other Long Term Obligations of the County System, the County has entered into the Master Authorization, which is appended to and incorporated into the Waste Disposal Agreement. The Master Authorization contains various covenants related to financial and operational aspects of the County System. Subject to the provisions of the Master Authorization permitting the application of System Revenues for other System Expenses, the Master Authorization provides for the pledge of all System Revenues to the payment of its Long Term Obligations. Pursuant to the Master Authorization, all revenues of the County attributable to the County System, including Service Charges imposed by the County and Tipping Fees collected by the County at the Transfer Station, are required to be deposited into the Solid Waste Enterprise Fund. All the costs incurred by the County in providing collection and disposal services through the County System are paid from the Solid Waste Enterprise Fund. The Master Authorization includes covenants relating to the establishment of accounts and payment priorities for expenses of the County System; limitations on the ability of the County to enter into certain long term contracts; the maintenance of specified reserves; the prudent operation and maintenance of the County System; the engagement of a consulting engineer to review the status of the County System on an ongoing basis; compliance with laws; and insurance requirements. The Master Authorization covenants are described in

"The County System—Master Authorization Covenants" and "Appendix D—Summary of Certain Provisions of the Master Authorization."

The Master Authorization includes a rate covenant (the "Rate Covenant"), which obligates the County to impose and charge rates, fees and other charges for solid waste services provided by the County System so as to comply with the requirement of Chapter 48 that the Solid Waste Enterprise Fund be maintained so that revenues equal expenses. The Rate Covenant also requires the County to impose Collection Charges sufficient to pay Collection Expenses. Specifically, the Rate Covenant requires the County to fix, charge and collect rates, fees and charges for Disposal Services so as to produce in each Fiscal Year System Revenues which, when combined with balances in certain accounts established under the Master Authorization, will in each Fiscal Year at least equal the sum of (1) 100% of the Operating Expenses of the County System for such Fiscal Year plus (2) 110% of the Long Term Expenses of the County System respecting debt service (which includes debt service on the Bonds) plus 100% of the sum of the balances of amounts payable as Long Term Expenses of the County System for such Fiscal Year plus (3) 100% of the sum of the amounts, if any, required to be deposited in accounts established under the Master authorization for such Fiscal Year.

The Master Authorization contains a service covenant (the "Service Covenant"), which requires the County to operate and maintain sufficient capacity in the County System in accordance with the County Ten Year Plan for the disposal or recycling of all Disposable Refuse generated in the County.

The flow control covenant of the Master Authorization (the "Flow Control Covenant") requires the County to deliver or cause the delivery to the County System of all Disposable Refuse generated (a) from Collection and Disposal District Residences (defined below) and (b) from County facilities. It also obligates the County to use its best efforts (other than by legislation) to deliver or cause the delivery to the County System of substantially all other Disposable Refuse generated within the County. This obligation is subject to the provisions of the County Ten Year Plan that provide for the development of

source reduction programs and commercial recycling programs which may be implemented through private facilities.

In addition, as long as the County meets its Rate Covenant contained in the Master Authorization relating to the generation of System Revenues at minimum levels, the Master Authorization permits the County to provide free or reduced rate disposal service with respect to specific types of solid waste in order to provide incentives for the use of certain components of the County System. If the County is not in compliance with its Rate Covenant, the Master Authorization prohibits the County from providing such service without charging for the cost of the service.

The County has agreed pursuant to the Master Authorization that, to the extent permitted by law, it will not operate, or permit in the County, any waste disposal facilities that will compete with the County System.

**County System Revenues.** The County deposits all revenues of the County System (the "System Revenues") into the Solid Waste Enterprise Fund. The System Revenues are expected to consist of (1) Service Charges collected by the County for providing solid waste management services through the County System (the "Service Charges"), (2) Tipping Fees paid to the County by private collectors and municipalities utilizing the County System, (3) payments from the County's general fund for services rendered to certain County facilities utilizing the County System ("County Facilities"), (4) revenues from the sale of recyclable materials, yard waste compost and methane gas generated at certain County landfills and fees collected for miscellaneous services and (5) investment earnings on balances in the Solid Waste Enterprise Fund. System Revenues do not include that portion of the service charges imposed on Collection and Disposal District Residences for the collection of disposable waste, as opposed to the collection and processing of recyclable materials or the provision of Disposal Services, even though these service charges are deposited in the Solid Waste Enterprise Fund. County Facilities do not include certain governmental facilities, including public schools and higher education facilities that are not under direct County control. In general, these entities retain private collectors for disposal of

solid waste generated from such facilities. The County Ten Year Plan precludes the acceptance by the County System of solid waste generated outside the County. Accordingly, the Feasibility Report does not assume, and neither the County, the Authority nor the Company expect, that there will be any System Revenues from disposal of such solid waste or electricity revenues generated from the disposal thereof.

Service Charges will consist of either (1) solid waste management service charges ("District Service Charges") collected by the County from residential housing with six or fewer units ("Collection and Disposal District Residences") in the Collection and Disposal District, which is to be expanded to include all of the unincorporated areas of the County or (2) system benefit charges imposed for solid waste management services on all residential and non-residential beneficiaries within a County-wide solid waste management district (the "Systems Benefit Charge").

The Systems Benefit Charge was authorized by Bill No. 42-92 enacted by the County Council on December 8, 1992 (the "Solid Waste Management District Legislation"), which empowered the County to impose the Systems Benefit Charge on residential and non-residential properties located within special service district covering the entire County (the "Solid Waste Management District"). The Systems Benefit Charge may be imposed on all generators of solid waste located in the Solid Waste Management District (or their collectors) to generate funds to provide for all or part of the costs of the County's solid waste management programs regardless of whether the solid waste is delivered to the County System. Although the County is empowered by the Solid Waste Management District Legislation to generate funds to provide for all System Expenses through the Systems Benefit Charge, it expects to continue to establish Tipping Fees and develop other sources of System Revenues.

Sufficient signatures to petition the Solid Waste Management District Legislation to referendum were filed on March 22, 1993. Therefore, the Solid Waste Management District Legislation and the Systems Benefit Charge will be effective only if and when a majority of County voters upholds the

Legislation in an election (anticipated in November, 1994). Neither the County nor the Authority can give any assurance as to the outcome of such an election. In anticipation of such a petition, the County Council adopted an amendment to the County Ten Year Plan to expand the Collection and Disposal District and to empower the County to impose District Service Charges on Collection and Disposal District Residences in the expanded Collection and Disposal District for solid waste management services made available by the County to Collection and Disposal District Residences. This amendment to the County Ten Year Plan is not subject to referendum. Thus, Service Charges will consist of District Service Charges from July 1, 1993, until such time as, and only if, a majority of County voters upholds the Systems Benefit Charge. Thirty days after any voter approval, (i) the Solid Waste Management District would go into effect, and (ii) the Collection and Disposal District would govern collection arrangements only in the approximately 80,000 households in the existing Collection and Disposal District. The County expects waste collected from Collection and Disposal District Residences in the expanded Collection and Disposal District to be delivered to the County System because the disposal cost will be paid through District Service Charges, and hence no Tipping Fee is payable by the collector for the delivery of this waste to the Transfer Station. Collectors delivering waste from generators other than Collection and Disposal District Residences are required to pay a Tipping Fee or other disposal fee at the Transfer Station. This waste ("Non-District Waste") consists primarily of waste generated by residential facilities with more than six units, commercial, light industrial facilities, certain governmental facilities (other than County Facilities) and certain incorporated municipalities located in the County. The County expects most collectors of Non-District Waste to use the County System because the Tipping Fee will be established for Non-District Waste at a level that is sufficiently competitive with alternate disposal facilities to attract Non-District Waste to the County System.

There have been threats of litigation challenging the validity and certain other aspects of both the Systems Benefit Charge and the District Service Charges. See "Project and Bond

Related Litigation" and the opinions of the County Attorney and Co-Bond Counsel described therein.

Whether Service Charges consist of the Systems Benefit Charge or of District Service Charges, Service Charges imposed by the County on residential property will be collected with the tax bill for the applicable properties. Pursuant to either method of charging, the County expects that once the Project is operational, Tipping Fees or other disposal fees at the Transfer Station would be established and collected from non-residential collectors and collectors of solid waste from certain incorporated municipalities in the County. The County intends that the Tipping Fee or other disposal fees will be established and collected at a level which is sufficiently competitive to maximize System Revenues and result in the delivery of substantially all of the solid waste generated in the County to the County System in accordance with the County's Flow Control Covenant in the Master Authorization. With the Tipping Fee or other disposal fees so set at a sufficiently competitive rate, the County expects that the balance of the System Revenues would be derived from the Service Charges (i.e., the District Service Charges or Systems Benefit Charge) and to a limited extent from the revenues from the sale of recyclables, yard waste compost, methane gas generated at certain County landfills and investment earnings in the Solid Waste Enterprise Fund.

*County System Expenses.* Amounts on deposit in the Solid Waste Enterprise Fund may only be used to pay for expenses of the County System, including the Waste Disposal Fee payable under the Waste Disposal Agreement ("System Expenses"). The Waste Disposal Fee is expected to constitute approximately 44% of the projected System Expenses in 1997, the first full year that the Project is expected to be operational. The remainder of the System Expenses is projected to consist of the cost of operating County System collection and recycling programs, of constructing and operating County System landfills, of payment of \$9,737,226 (outstanding principal amount as of June 30, 1993) of County general obligation bonds issued to finance certain other County System facilities (as defined below, the "Prior County Bonds"), of the payment of County solid waste system revenue bonds or notes issued pursuant to the

Master Authorization and of services of County employees in connection with the County System. Some System Expenses are payable pursuant to multi-year contracts for the operation of the existing Oaks Landfill and the MRF.

\* \* \*

*The Project.* The Project will be owned by the Authority and will function as a component of the County System. The Project will consist of (1) the Facility, (2) improvements to the County's existing Transfer Station, and (3) the Transportation System. In the County Ten Year Plan, the County has designated the Project as the central disposal facility for municipal solid waste generated in the County. The Facility will be designed to process 1,800 tons-per-day of solid waste through the use of the Martin GmbH mass-burning technology and to have an annual effective operating capacity of 558,450 tons-per-year assuming the design heat value of the waste. The Facility is designed with a net electricity generating capacity of approximately 48 megawatts. The Facility's air pollution control equipment will include furnace lime injection, acid gas scrubbers, baghouses, nitrogen oxide control equipment and mercury control equipment.

The Transfer Station is located in Derwood, Maryland, in the central portion of the County, approximately 18 miles from the Facility. It is and will remain the primary facility in the County System where solid waste is accepted from collectors. It has been in commercial operation since 1982 as the only facility in the County System where non-recycled solid waste (except for certain County-generated construction debris which is directed to a County System landfill after being weighed at the scales at the Transfer Station) is accepted for disposal. The County will continue to operate the scales at the Transfer Station and to collect Tipping Fees from private collectors delivering waste to the Transfer Station. Transfer Station improvements (the "Transfer Station Improvements") will include the installation of compaction equipment.

The Transportation System includes rail cars and inter-modal sealed containers for the transportation of solid waste between the Transfer Station and the Facility. Waste will be

transported from the Transfer Station to the Facility by rail. Residue generated by the processing of waste at the Facility ("Residue"), as well as bypassed Waste and Nonprocessable Waste will be transported by truck from the Facility to the Site Two Landfill. Rail yards will be constructed at the Transfer Station and the Facility. As provided in the County Ten Year Plan, waste will be transported from the Transfer Station to the Facility only by rail.

*System Landfills.* The County System also includes landfill capacity which will be used for the disposal of Residue and waste that is not processed at the Facility. Since 1982, the County System's primary solid waste disposal facility has been the Oaks Landfill, which is owned by the County and is currently operated by Browning Ferris Industries, Inc. pursuant to a multiyear contract. Pursuant to the County Ten Year Plan, the County will not use the Oaks Landfill as the County's primary disposal facility once it enters into short-term arrangements for the disposal of waste at an out-of-County facility or after the Site Two Landfill or another in-County landfill is operational. The County Ten Year Plan provides that until the Site Two Landfill or another County-owned landfill is completed, the Oaks Landfill shall be maintained in readiness as a backup landfill for unrecycled solid waste (including Residue) if the short-term arrangements are not consummated for any reason or if out-of-County disposal is interrupted (temporarily or permanently) for any reason. The County has also acquired options on a portion of the site, and is in the final phase of the permitting process, for the Site Two Landfill, which, when operational, will have separate monofill capacity for Residue, as well as separate cells for Bypassed Waste and Nonprocessable Waste. The Site Two Landfill is expected to be able to accommodate the disposal of 9.5 million cubic yards of waste and to be available by January 1, 1996. When the Site Two Landfill or any other County-owned landfill opens, the Oaks Landfill will be permanently closed.

## Project Agreements

*Waste Disposal Agreement.* The Authority will use the Project to provide certain solid waste disposal services to the County System under the Waste Disposal Agreement. The Waste Disposal Agreement obligates the Authority to cause the Company to design, construct and operate the Project, which will function as a component of the County System. The County will have the exclusive right to the waste disposal capacity of the Project pursuant to the Waste Disposal Agreement. The Waste Disposal Agreement will be in effect when the Series 1993 Bonds are issued and will remain in effect until the maturity date of all outstanding Bonds or the date on which all outstanding Bonds are defeased, unless the Service Agreement is terminated due to a Company event of default (a "Company Default Termination") and the Company is obligated to pay debt service on all or a portion of the outstanding Bonds as a component of damages. See "Sources of Payment and Security for the Bonds – Debt Service Payable Primarily from Company Damage Payments." The Indenture provides that the Authority shall not terminate the Waste Disposal Agreement in the event of a County event of default under the Waste Disposal Agreement, but shall enforce its rights under the Waste Disposal Agreement. The Waste Disposal Agreement requires the County to pay the Authority monthly installments of the Waste Disposal Fee for the solid waste disposal services provided by the Authority. The Waste Disposal Fee includes amounts in respect of debt service on the Bonds, plus amounts payable by the Authority to the Company under the Service Agreement, plus other Authority costs of operating, maintaining, or administering the Project or of providing services under the Waste Disposal Agreement, less Authority Component Revenues. Authority Component Revenues generally consist of payments by PEPCO in respect of the sale of electricity generated and electrical generating capacity made available by the Facility, the Authority's share of any revenues from the sale of Recovered Materials, investment earnings on funds held under the Indenture and damages paid to the Authority under any Project Agreements, including the Service Agreement. The Waste

Disposal Fee automatically increases to account for any net increases in the cost of providing service, including the portion of cost increases due to the occurrence of Uncontrollable Circumstances not borne by the Company. The County's obligations under the Waste Disposal Agreement are limited to amounts in the Solid Waste Enterprise Fund available for such purposes pursuant to the Master Authorization. See "Sources of Payment and Security for the Bonds – Project Revenues from Waste Disposal Fees." With certain exceptions, the Waste Disposal Agreement does not require payment by the County of the debt service component of the Waste Disposal Fee during the Extension Period or if Facility operations are terminated in connection with a termination of the Service Agreement due to Company default. If the Service Agreement is terminated for Company default and Facility operations are continued, the Company may be responsible for the payment of debt service on a portion of the Bonds and the Waste Disposal Fee will include a debt service component for the remaining Bonds. See "Sources of Payment and Security for the Bonds – Debt Service Payable Primarily from Company Damage Payments" and "– Designated Bonds." Under the Indenture, certain conditions apply to the termination of the Service Agreement by the Authority. The Indenture provides that the Authority may not terminate the Service Agreement and continue operations at the Facility unless, among other things, the Authority engages the services of an acceptable substitute operator of the Facility (a "Qualified Substitute Operator") and unless the County and the Authority enter into an amendment of the Waste Disposal Agreement which provides for continued payment of the Waste Disposal Fee (including the portion of the debt service component not payable by the Company as part of its termination damages) following the termination of the Service Agreement. In addition, the Indenture provides that the Authority may not terminate the Service Agreement due to Company default and abandon operations at the Facility if the Project satisfies the Minimum Performance Standards during a Termination Performance Test and a Qualified Substitute Operator assumes the

Company's obligations under the Service Agreement. See "Appendix C: Summary of Certain Provisions of the Indenture—Exercise of Certain Rights."

*Service Agreement.* The Authority has entered into a long-term Service Agreement with the Company to serve as a full-service vendor for the Project. All obligations of the Company under the Service Agreement are guaranteed by Ogden Corporation pursuant to its Guaranty Agreement in favor of the Authority. The Service Agreement is in effect for an initial term of 20 years from the acceptance of the Project (or, if later, the date of maturity or prior payment of the Bonds) and provides for two additional 5-year extensions at the option of the Authority.

The Company's agreements under the Service Agreement to design, construct and operate the Project correspond substantially to the Authority's obligations under the Waste Disposal Agreement. Pursuant to the Waste Disposal Agreement, the County recognizes that performance by the Company of these obligations in accordance with the Service Agreement constitutes performance by the Authority under the Waste Disposal Agreement.

The Company must design, build, equip, startup and test the project. The estimated construction price of the Project is approximately \$278,000,000. The Company is required to complete the construction and testing of the Project by the Scheduled Acceptance Date, which is 1,011 days after the Commencement Date. Both the Fixed Construction Price and Scheduled Acceptance Date must be adjusted for certain delays and costs caused by Uncontrollable Circumstances and changes to the Project required by the County or the Authority, and such adjustments do not constitute defaults by the Company under the Service Agreement. See "Appendix G: Summary of Certain Provisions of the Service Agreement—Operation of the Project—Uncontrollable Circumstances."

Beginning on a date in 1993 designated by the County, the Company will operate and maintain the Transfer Station and accept and dispose of at the Designated Landfill all Acceptable Waste delivered to the Transfer Station, subject however to the Company's rights to reject waste, including its right to reject waste in amounts greater than specified in daily, weekly and

annual limits. Pursuant to the County Ten Year Plan, the County may select one or more service providers to provide hauling and out-of-County disposal service for waste generated in the County until the Site Two Landfill or another County-owned landfill is completed. Upon such selection, certain provisions of the Service Agreement will be modified to comport with the terms and conditions of this short-term hauling arrangement. Upon finalization of these short-term hauling arrangements, waste accepted by the Company at the Transfer Station that is not needed for start-up or testing of the Project will be loaded at the Transfer Station and transported to the contracted out-of-County facilities for disposal. The County Ten Year Plan provides that if the out-of-County disposal facilities are not available for any reason during this period, the County will make available capacity at its in-County landfill for disposal of unrecycled solid waste accepted by the Company at the Transfer Station. This may include Residue. See "Appendix G: Summary of Certain Provisions of the Service Agreement—Construction of the Project—Operations of the Transfer Station During the Extension Period."

Upon completion of the construction of the Project, acceptance tests will be performed to determine the ability of the Project to meet specified guarantees, including processing capacity, electrical generation, and environmental compliance. The Performance Standards for waste throughput and electricity production provide that the Facility will be able to process up to 558,450 tons-per-year of solid waste, and generate for sale to PEPCO at least 643 kilowatt hours of electrical energy per ton of waste processed, net of electricity consumption by the Facility, subject in each case to adjustment based upon the heating value of the waste, the operating effects of the mercury control equipment, and the availability of certain minimum quantities of process water. If the Company fails to cause the Project to be accepted at the full Performance Standards by the Scheduled Acceptance Date, an Extension Period of up to one year (subject to further extension as a result of Authority Changes or Uncontrollable Circumstances) may be elected by the Company. During the Extension Period, the Company may elect to have the Facility accepted at standards less than the full Performance

Standards (but no lower than the applicable Minimum Performance Standards). See "Appendix G: Summary of Certain Provisions of the Service Agreement—Construction of the Project—Extension Period" and "—Acceptance of Project at Reduced Performance Standards."

At the Company's request, the Authority and the County Representative may (in their sole discretion) elect to have the Project accepted at a standard lower than the Minimum Performance Standards. If the Project is accepted at a Performance Standard lower than the Minimum Performance Standards (the "Substituted Performance Standards"), then (1) the Acceptance Date will occur and (2) at the sole election of the Authority, the Company must pay either (A) liquidated damages to the Authority during the remaining term of the Service Agreement or (B) Reduced Capacity Liquidated Damages. See "Construction and Operation of the Project—Construction—*Extension Period*." Reduced Capacity Liquidated Damages are required by the Indenture to be applied to an extraordinary redemption of the Bonds. The Authority may terminate the Service Agreement if Performance Tests demonstrate that the Project does not satisfy the Minimum Performance Standards by the end of the Extension Period.

After acceptance of the Project, the Company must operate the Project for a period of 20 years or, if longer, the period ending on the final maturity date of the Bonds. The Company must provide all personnel, supplies and materials for the Project and perform all ordinary and extraordinary maintenance on the Project during the term of the Service Agreement. It will also administer the Electricity Sales Agreement, the Facility Site Agreement and the Rail Transportation Agreement. The Authority will pay the Company a monthly Service Fee consisting of an Operating Charge plus Approved Pass Through Costs and Service Fee Adjustments plus a share of energy revenues less damages payable to the Authority. See "Construction and Operation of the Project—Operation" for a description of certain obligations of the Company and the Authority after acceptance has occurred.

If during any Fiscal Year Acceptable Waste in an amount less than the Guaranteed Throughput Capacity is delivered to

the Facility by or on behalf of the County as a result of increased recycling or a decrease in the amount of Processible Waste generated in the County, then the Company's annual Operating Charge will be reduced. See "Appendix G: Summary of Certain Provisions of the Service Agreement—Changes in Design, Construction or Operation—*Reduced Facility Operating Level*."

If the Service Agreement is terminated due to Company default, the Company is obligated to pay termination damages to the Authority in an amount at least sufficient to defease all or a portion of the Bonds depending on the throughput capacity of the Project at the time of termination and on whether the Authority and the County intend to continue operations at the Project. If the Authority and the County elect to continue to operate the Project, the Service Agreement obligates the Company to pay as a component of termination damages an amount equal to a portion of the outstanding Bonds determined based upon the shortfall in the throughput capacity of the Facility, if any (as compared to the Guaranteed Throughput Capacity) and such amount is required to be applied to redeem the designated portion of the Bonds (the "Designated Bonds") or, at the Company's election in certain circumstances, to pay principal and interest on such Designated Bonds in accordance with the scheduled payment terms thereof. See "Sources of Payment and Security for the Bonds—Debt Service Payable Primarily from Company Damage Payments" and "—Designated Bonds." For a discussion of the enforceability of the Company's obligations to pay damages, see "Sources of Payment and Security for the Bonds—Limits on Enforceability."

*Guaranty Agreement.* In the Guaranty Agreement, Ogden Corporation has unconditionally guaranteed the performance by the Company of all of the Company's obligations under the Service Agreement. In order to further secure performance by the Company of its obligations under the Service Agreement, the Authority may require the Company to provide a Guarantor Security Letter of Credit in an amount not to exceed \$50 million if (1) requested by the County or (2) Ogden Corporation's senior debt, subordinated debt, or preferred stock does not have a rating in the category of "Baa" or better by Moody's or in the category of "BBB" or better by Standard &

Poor's. See "Sources of Payment and Security for the Bonds — Ogden Corporation Guaranty of Company's Performance." The County may also require delivery of a Guarantor Security Letter of Credit at any time at its option. Neither the Authority nor the County has required delivery of a Guarantor Security Letter of Credit prior to the issuance of the Series 1993 Bonds.

*Rail Transportation Agreement.* The Authority has entered into a Railroad Transportation Agreement (the "Rail Transportation Agreement") with CSX Transportation, Inc. ("CSX"), which obligates CSX to provide a locomotive and crew and to haul the Authority-owned rail cars and containers between the Transfer Station and the Facility. The Authority must pay CSX for rail haul services based on the tonnages of solid waste and Residue hauled except that a minimum annual payment of \$1,500,000 is required. The Company will administer certain provisions of the Rail Transportation Agreement pursuant to the Service Agreement.

*Electricity Sales Agreement.* The Authority has entered into an Electricity Sales Agreement with PEPCO (the "Electricity Sales Agreement"), which obligates PEPCO to make payments for electricity generated and electrical generating capacity made available by the Facility pursuant to the Electricity Sales Agreement. The prices for energy and capacity delivered under the Electricity Sales Agreement are established by reference to PEPCO's tariff for purchases from cogeneration facilities that is filed with and approved by the Maryland Public Service Commission (the "PSC") from time to time. The tariff reflects PEPCO's avoided cost of producing electricity and capacity. The rates for electricity and capacity may be changed due to a change in PEPCO's future demand for electricity, the future addition of generating units by PEPCO or a change in the operating cost of future generating units in the PEPCO system. See "Appendix H: Summary of Certain provisions of the Electricity Sales Agreement — Purchase and Sale of Electricity." The Facility's electrical generating capacity is established by the Authority and will be tested periodically. The Electricity Sales Agreement imposes damages on the Authority if the Facility falls substantially below the certified capacity level. See "Appendix H: Summary of Certain Provisions of the Electricity Sales

Agreement — Capacity Guarantee." The Company will administer certain provisions of the Electricity Sales Agreement pursuant to the Service Agreement.

*Landfill Agreement.* The Authority and the County have also entered into a Landfill Agreement (the "Landfill Agreement"), which obligates the County to make available to the Authority landfill capacity for the disposal of Bypassed Waste and Residue for the first five years of Project operations and thereafter to provide such capacity to the extent it is available. The Landfill Agreement is effective as long as any Series 1993 Bonds are outstanding (unless the Service Agreement is terminated due to the fault of the Company and the Project is abandoned, in which case the Landfill Agreement will terminate). During the term of the Waste Disposal Agreement, the County may charge the Authority a Landfill Fee based on the County's actual cost of operating the landfill for waste delivered by or on behalf of the Authority. The Landfill Fee paid by the Authority will in turn be included in the Waste Disposal Fee.

*Project Site Lease.* The County owns the Project Sites, which include the Transfer Station, the Facility Site, an access road through the Composting Facility and easements granted under the Facility Site Agreement between the Authority and PEPCO (the "Facility Site Agreement"), and has leased them to the Authority under a Project Site Lease for a term of 40 years unless sooner terminated as described in Appendix K.

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Excerpts From  
**OFFICIAL STATEMENT**  
**\$135,600,000**  
**LANCASTER COUNTY**  
**SOLID WASTE MANAGEMENT AUTHORITY**  
**RESOURCE RECOVERY**  
**SYSTEM REVENUE BONDS**  
**SERIES A OF 1988**  
**SUMMARY STATEMENT**

The following presents summary information regarding the offering of the Series A Bonds and is qualified in its entirety by reference to the more detailed descriptions appearing in this Official Statement and by reference to the documents described in this Official Statement. No person is authorized to make offers to sell, or solicit offers to buy, the Series A Bonds unless the entire Official Statement is delivered in connection with such offer or solicitation.

Reference should be made to the definitions appearing in Appendices D and G and in the Indenture for the definitions of certain capitalized terms used in this summary and elsewhere in this Official Statement.

#### Issuer

Lancaster County Solid Waste Management Authority is a body corporate and politic organized and existing under the Municipality Authorities Act of 1945 of the Commonwealth of Pennsylvania. Under the Lancaster County Solid Waste Management Plan 1986 (the "1986 Plan"), the Intermunicipal Agreement and the County Agreement, the Authority has various responsibilities for waste disposal in Lancaster County. The Authority has no taxing power.

#### Bonds

The Authority is offering \$135,600,000 of its Series A Bonds pursuant to this Official Statement. The Series A Bonds are being issued pursuant to a Trust Indenture dated as of June 1,

1988 between the Authority and Fulton Bank, Lancaster, Pennsylvania (the "Trustee"), and between the Authority and Hamilton Bank, Philadelphia, Pennsylvania (the "Co-Trustee"). The Authority intends to issue not in excess of \$45,000,000 of Landfill Bonds to finance a portion of the cost of the Landfill Project.

#### Use of Proceeds

The proceeds of the Series A Bonds will be used to finance a portion of the cost of the acquisition, construction, equipment and installation of a mass burn resource recovery facility and related facilities for the combustion of solid waste and electricity generation (the "Facility"), the Facility Site and related facilities for the transmission of electricity (the "Resource Recovery Project"). The proceeds of the Series A Bonds will also be used to pay capitalized interest on the Series A Bonds during the construction of the Facility, to make a deposit into the Series A Bonds Debt Service Reserve Fund and to pay certain costs of issuance of the Series A Bonds.

Except for the payment of costs of issuance, the proceeds of the Series A Bonds will be held in escrow and will not be disbursed until (1) the governmental permits and approvals necessary for the commencement of construction of the Facility shall have been received, (2) the Pennsylvania Public Utility Commission shall have taken the actions necessary to be taken by it for effectiveness of the Electricity Sales Contract, (3) the Company shall have honored or agreed to honor the Construction Notice to Proceed given by the Authority under the Construction Agreement and (4) the Consulting Engineer shall have given an opinion that there have been no material adverse changes to the conclusions of the Consulting Engineer's Feasibility Report dated June 16, 1988.

#### Security for the Series A Bonds

The Series A Bonds, the Landfill Bonds and all Additional Bonds issued under the Indenture are and will be secured, as provided in the Indenture, by the pledge thereunder of all of the Authority's right, title and interest in and to the Authority's

Revenues and by all moneys and securities held from time to time in specified Funds and Accounts held by the Trustee (other than the Rebate Fund) under the Indenture. Revenues include, among other things, all Tipping Fees and, after the construction and commencement of operation of the Facility, amounts to be paid by Metropolitan Edison Company under the Electricity Sales Contract. The Revenue Fund, into which the Authority is to deposit all Revenues other than certain proceeds from a Loss Event, is to be held by the Authority unless there is an Event of Default and, unless there is an Event of Default, will not be a trust fund under the Indenture. The Series A Bonds, but not the Landfill Bonds, are secured by amounts in the Series A Bonds Debt Service Reserve Fund.

Under the Indenture, disbursement of moneys from the Revenue Fund shall be under the sole management of the Authority and the Authority is required to disburse money in the Revenue Fund in a particular order so long as no Event of Default has occurred and is continuing. Upon the occurrence of an Event of Default, the Indenture provides that the Authority shall transfer the Revenue Fund to the Trustee and, until such Event of Default is cured, the Revenue Fund shall be maintained by the Trustee and shall be part of the Trust Estate. See Appendix C, "Summary of Indenture" herein.

In addition to the foregoing, the Authority has assigned and pledged to the Trustee, for the benefit of the owners of the Bonds issued under the Indenture, all of its right, title and interest in and to the County Agreement, the County Assignment, the Construction Agreement, the Service Agreement, the Guarantee Agreement and the Electricity Sales Contract, excluding certain reserved rights.

The Indenture includes a rate covenant pursuant to which the Authority covenants to fix, charge and collect, or cause to be fixed, charged and collected, rates, fees and charges for the use of the System and for services provided by the Authority which, together with all other Revenues and all other available funds, will, in each Fiscal Year, be sufficient to provide for payment of expenses of operating, maintaining and repairing the System, administration expenses of the Authority, debt service on all Bonds issued under the Indenture, debt service on all other

debt obligations of the Authority, and amounts required, if any, to be deposited into applicable debt service reserve funds.

The Series A Bonds are special limited obligations of the Authority and are payable solely from and secured by the Trust Estate, which includes, among other things, the Revenues and the Funds pledged therefor under the Indenture. Neither the credit nor the taxing power of the County or of any municipality in the County or of the Commonwealth or of any other political subdivision thereof is pledged for the payment of the Series A Bonds nor shall the Series A Bonds be deemed to be an obligation of any of such entities. The Authority has no taxing power.

### Construction and Operation of the Facility

The Facility is to be designed and constructed by the Company pursuant to the Construction Agreement and operated by the Company pursuant to the Service Agreement. The Authority currently expects the Construction Date to occur on or about February 1989. Construction of the Facility is anticipated to be completed in 28 months from the Construction Date. Under the Construction Agreement, the Facility is required to meet certain Performance Guarantees. The Construction Agreement sets forth various consequences if the Facility does not meet the Performance Guarantees. In addition, the Construction Agreement includes various provisions related to Uncontrollable Circumstances and Work Changes.

Under the Service Agreement, the Company is to operate and maintain the Facility for 20 years after the earlier of the Acceptance Date or the date the Facility is placed in service, with the Authority having an option to extend the period for five years (such periods being subject to certain adjustments). The Authority will pay the Company a fee for its services, including a fixed component which is adjusted each year based on an inflation factor and a share of energy and recovered materials revenues. The Service Agreement requires the Company to operate the Facility to continually meet the Performance Guarantees and specifies various consequences if it does not. In

addition, the Service Agreement includes various provisions related to Uncontrollable Circumstances and Work Changes.

See Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto" for summaries of the Construction Agreement and the Service Agreement.

Ogden Corporation has guaranteed the obligations of the Company under the Construction Agreement and the Service Agreement. See Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto — Guarantee Agreement".

#### Electricity Sales Contract

The Authority has entered into an Electricity Sales Contract with Metropolitan Edison Company pursuant to which electricity generated by the Facility and not used in the operation of the Facility will be sold to Metropolitan Edison Company. The Electricity Sales Contract has a term of 25 years beginning on the date the Facility commences commercial operation. See Appendix D — "Information Concerning Agreements Related to the Facility and Parties Thereto" for more information regarding the Electricity Sales Contract.

#### Waste Flow Control

The 1986 Plan was prepared to comply with the requirements of Pennsylvania's Solid Waste Management Act, which is a comprehensive law regulating the management of solid waste disposal throughout Pennsylvania. The 1986 Plan was approved by Lancaster County and all municipalities in Lancaster County and received final approval from the Pennsylvania Department of Environmental Resources on September 30, 1986. In order to implement the 1986 Plan, Lancaster County entered into the Intermunicipal Agreement with each of the municipalities in the County, entered into the County Agreement with the Authority and adopted a Waste Flow Ordinance and each municipality in the County adopted a Municipal Waste Flow Ordinance and entered into the Intermunicipal Agreement. The effect of such agreements and ordinances is to require the delivery to the System of substantially all municipal solid waste generated

within Lancaster County and not source separated or recycled, require licensing by the Authority of all municipal waste collectors and haulers and provide for Authority administration and County enforcement of the ordinances, including Authority establishment of fees for delivery of waste to the System. See "Waste Flow Control" herein.

**OFFICIAL STATEMENT**

Relating to  
\$135,600,000

**LANCASTER COUNTY SOLID WASTE  
MANAGEMENT AUTHORITY**

Resource Recovery System Revenue Bonds  
Series A of 1988

**INTRODUCTION****General**

The purpose of this Official Statement, which includes the cover page and the Appendices hereto, is to provide information in connection with the issuance and sale by Lancaster County Solid Waste Management Authority (the "Authority"), of its Resource Recovery System Revenue Bonds, Series A of 1988 in the aggregate principal amount of \$135,600,000 (the "Series A Bonds"). The Series A Bonds are being issued to finance a portion of the cost of the Resource Recovery Project.

The Series A Bonds are being issued by the Authority pursuant to a Trust Indenture dated as of June 1, 1988 (the "Indenture") between the Authority and Fulton Bank, Lancaster, Pennsylvania, as trustee (the "Trustee"), and Hamilton Bank, Philadelphia, Pennsylvania, as co-trustee (the "Co-Trustee"), and in accordance with the provisions of the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended and supplemented (the "Act").

The Authority intends to issue not in excess of \$45,000,000 of its Resource Recovery System Revenue Bonds, Landfill Series of 1988 (the "Landfill Bonds") to finance a portion of the costs of the Landfill Project.

Certain capitalized terms used in this Official Statement that are not defined elsewhere herein are used with the meanings set forth in Appendix G hereto or in the Indenture.

**Purpose of the Financings**

The proceeds of the Series A Bonds will be used to finance a portion of the cost to acquire, construct, equip and install a

mass burn resource recovery facility and related facilities for the combustion of solid waste and electricity generation (the "Facility") in Lancaster County, Pennsylvania, the Facility Site and related facilities for the transmission of electricity (the "Resource Recovery Project"). The Facility will be acquired, constructed, equipped and installed pursuant to a Design and Construction Agreement dated as of September 25, 1987, as amended or modified (the "Construction Agreement"), between the Authority and Ogden Martin Systems of Lancaster, Inc. (the "Company"), a Pennsylvania corporation. The Facility will be owned by the Authority. The Company will operate the Facility pursuant to a Service Agreement dated as of September 25, 1987, as amended or modified (the "Service Agreement"), between the Authority and the Company. The Company is a direct wholly-owned subsidiary of Ogden Martin Systems, Inc., a Delaware corporation, which in turn is an indirect wholly-owned subsidiary of Ogden Corporation, a Delaware corporation. The Company was formed in 1987 for general corporate purposes, including designing, constructing and operating the Facility. The obligations of the Company under the Construction Agreement and the Service Agreement are guaranteed by Ogden Corporation.

The proceeds of the Landfill Bonds will be used to pay a portion of the costs of the Landfill Project. The Authority has acquired ownership of a 153 acre parcel of land adjacent to its existing Creswell landfill and intends to develop this parcel of land as an additional landfill. The proceeds of the Landfill Bonds are intended to be used to refinance temporary indebtedness incurred to acquire this parcel and to pay costs for design and engineering of the landfill to be constructed on this parcel, construction and equipment of a leachate treatment system and construction of the first two cells of the landfill.

The Resource Recovery Project and the Landfill Project are integral parts of the Authority's planned overall solid waste management and disposal system (the "System"). In addition to these components, the Authority owns and operates a transfer station, an existing landfill and vehicles, machinery and equipment used in connection with the transfer station, transportation

of solid waste from the transfer station to the existing landfill and disposal of solid waste at the existing landfill.

### USE OF PROCEEDS

The proceeds of the sale of the Series A Bonds will be used, together with investment earnings thereon and other funds, to pay a portion of the costs of the Resource Recovery Project, to fund the Series A Bonds Debt Service Reserve Fund for the Series A Bonds, to fund interest on the Series A Bonds prior to and during the first twenty-five months of the anticipated construction period and to pay certain costs of issuance.

The Authority is an operating entity which, since its formation in December 1954, has provided solid waste disposal services to municipalities and private haulers in the County. The Authority's first landfill began operation on October 3, 1955. This landfill was located in Manheim Township, to the west of Lancaster City, at property owned by the Lancaster Brick Company. In 1955, landfill disposal fees ranged from 30 cents per cubic yard decreasing to 15 cents per cubic yard for persons delivering larger volumes. In 1962, the Authority started land-filling at a site south of Lancaster City. This site is now a part of the Lancaster County Park. In 1964, the Authority acquired land at Creswell, Manor Township, and in 1968 began landfiling at the Creswell site. In order to minimize the effects of the longer hauling distance to the Creswell landfill, the Authority constructed a transfer station in Manheim Township which also has been in operation since 1968. The Authority completed landfiling operations at both the Lancaster Brick Company site and the Lancaster County Park site prior to 1970. Both sites and the Creswell site, along with 61 other sites in the County and 2,117 other sites within the Commonwealth of Pennsylvania, have been included on the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS"). CERCLIS is a list of sites identified by or referred to the United States Environmental Protection Agency as being worthy of investigation. The Authority cannot predict whether, and to what extent, it may have any liabilities or responsibilities with respect to any of the three sites.

The following information shows how both tipping fees and waste tonnages have increased over the years:

<u>Year</u>	<u>Tipping Fee (per ton disposal charges)</u>	<u>Waste Tonnage (tons)</u>
1980	\$ 8.30	270,554
1981	\$ 9.00	262,564
1982	\$ 9.90	240,836
1983	\$10.50	242,944
1984	\$11.00	272,354
1985	\$12.00 to June 1, then \$14.00 to December 31	328,888
1986	\$16.00 to June 1, then \$19.00 to December 31	396,454
1987	\$25.00	405,132
1988	\$33.00	—

Prior to January 1, 1988, substantial amounts of solid waste generated in Lancaster County were disposed of at the Lancaster landfill operated by the Chester County Solid Waste Management Authority. During 1987, the Lancaster landfill was utilized for disposal of 242,752 tons of solid waste generated in Lancaster County. The Authority's contract with the Chester County Solid Waste Management Authority, which provided for an \$8.00 per ton tipping fee during 1987, expired December 31, 1987; and the solid waste from Lancaster County which was previously disposed of at the Lancaster landfill is now being disposed of at the Creswell landfill. The tipping fees charged by the Authority prior to 1988 reflected the favorable terms under the contract with the Chester County Solid Waste Management Authority and are not representative of fees expected to be charged in the future.

The Authority presently owns and operates (a) a transfer station located at 1299 Harrisburg Pike, Manheim Township, Lancaster County, Pennsylvania, (b) the Creswell landfill located along River Road at Creswell, Manor Township, Lancaster County, Pennsylvania and (c) vehicles, machinery and equipment which are used in connection with the transfer station, transportation of solid waste from the transfer station to the Creswell landfill and disposal of solid waste at the Creswell landfill. The County's solid waste disposal needs are currently provided by landfill disposal at the Creswell landfill and by

unlined sanitary landfills operated by Drumore Township (disposal of approximately 150 tons annually with an estimated remaining useful life of about 2 years) and Colerain Township (disposal of approximately 260 tons annually with an estimated remaining useful life of about 2 years).

In December, 1986, the Authority purchased 153 acres adjacent to its existing landfill. This tract is to be the site of the additional landfill to be financed in part with proceeds of the Landfill Bonds. Also, in December, 1986, the Authority acquired a tract in Conoy Township. A portion of this tract (approximately 56 acres) is intended for use as the site of the Facility.

Audited financial statements of the Authority for the fiscal years 1987 and 1986 and for the period October 1, 1987 to December 31, 1987 are presented in Appendix B hereto. The results of operations of the Authority in future years, and particularly after construction of the Facility, may be significantly different from those represented in these financial statements. The Authority changed from a fiscal year ending September 30 to a fiscal year ending December 31, effective October 1, 1987.

### THE COMPANY

The Facility is to be designed and constructed by the Company pursuant to the Construction Agreement and operated by the Company pursuant to the Service Agreement. The Company is a direct wholly-owned subsidiary of Ogden Martin Systems, Inc., a Delaware corporation, which in turn is an indirect wholly-owned subsidiary of Ogden Corporation, a Delaware corporation. Ogden Martin Systems, Inc., through subsidiaries, currently operates five plants located in the United States which are generally similar in design and construction to the Facility.

The Company was formed in 1987 for general corporate purposes, including designing, constructing and operating the

Facility. The obligations of the Company under the Construction Agreement and the Service Agreement have been guaranteed by Ogden Corporation. For additional information concerning the Company, Ogden Martin Systems, Inc. and Ogden Corporation, see Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto — The Company, Ogden Martin Systems, Inc. and Ogden Corporation."

\* \* \*

### SECURITY FOR THE SERIES A BONDS

The Series A Bonds and the Landfill Bonds (collectively, the "1988 Bonds") and all Additional Bonds issued under the Indenture are and will be secured, as provided in and subject to the limitations of the Indenture, by the pledge thereunder of all of the Authority's right, title and interest in and to the Revenues of the Authority, and by all moneys and securities held from time to time in specified Funds and Accounts (other than the Rebate Fund) established under the Indenture. Under the terms of the Indenture, additional debt can be issued which will be equally and ratably secured as to Revenues with the 1988 Bonds. See "Additional Indebtedness — Other Indebtedness."

In addition to the foregoing, the Authority has assigned and pledged to the Trustee, for the benefit of the owners of the 1988 Bonds, all of its right, title and interest in and to the County Agreement, the County Assignment, the Construction Agreement, the Service Agreement, the Guarantee Agreement and the Electricity Sales Contract, excluding certain reserved rights. Pursuant to such pledge and assignment, the Trustee may require the Authority to carry out such agreements for the benefit of the Bondholders.

The 1988 Bonds are special limited obligations of the Authority and are payable solely from and secured solely by the Trust Estate which includes, among other things, the Revenues and the funds pledged therefor under the Indenture. Neither the credit nor the taxing power of the County or of any municipality in the County or of the Commonwealth or of any other political subdivision thereof is pledged for the payment of

the 1988 Bonds nor shall the 1988 Bonds be deemed to be an obligation of any of such entities. The Authority has no taxing power.

#### Rate Covenant

In the Indenture, the Authority covenants to fix, charge and collect, or cause to be fixed, charged and collected, rates, fees and charges, for the use of the System and for services provided by the Authority which, together with all other Revenues of the Authority and all other available funds, will, in each Fiscal Year, be sufficient to provide for payment of expenses of operating, maintaining and repairing the System, administration expenses of the Authority, debt service on all Bonds issued under the Indenture, including the Series A Bonds, debt service on all other debt obligations of the Authority, amounts required, if any, to be deposited into any applicable debt service reserve fund in such Fiscal Year and amounts necessary to pay any other obligations of the Authority. This covenant is not qualified or limited under the Indenture.

#### WASTE FLOW CONTROL

In 1980, Pennsylvania adopted the Solid Waste Management Act (the "Solid Waste Management Act"). The Solid Waste Management Act is a comprehensive law regulating the management of solid waste disposal throughout Pennsylvania. The Solid Waste Management Act requires each municipality of the Commonwealth with a population density of at least 300 people per square mile to adopt a solid waste management plan and to periodically update existing solid waste management plans.

The 1986 Plan was prepared in accordance with the requirements of the Solid Waste Management Act. The 1986 Plan was intended to provide guidance for the implementation of new or expanded transfer, processing and disposal facilities and for the establishment of an overall solid waste management system within Lancaster County. All of the municipalities in Lancaster County have approved the 1986 Plan and agreed to delegate their solid waste management responsibilities to Lancaster County or the Authority. The Pennsylvania Department of

Environmental Resources granted final approval of the 1986 Plan on September 30, 1987.

In order to implement the 1986 Plan, Lancaster County entered into the Intermunicipal Agreement with each of the municipalities in the County and the County Agreement with the Authority. The County also adopted a Waste Flow Ordinance and each municipality in the County adopted a Municipal Waste Flow Ordinance. The effect of such agreements and ordinances is to (i) require the delivery to the System of substantially all Regulated Municipal Waste generated within Lancaster County and not source separated or recycled; (ii) require licensing of all municipal waste collectors and haulers; and (iii) provide for Authority administration and County enforcement of the ordinances.

#### Intermunicipal Agreement

The Intermunicipal Agreement includes, among other provisions, the following:

(a) During the term of the Intermunicipal Agreement, each Participating Municipality and the County shall deliver or cause to be delivered all Regulated Municipal Waste to the System:

(b) Each Participating Municipality agrees to adopt a Waste Flow Ordinance (and each has done so) which forbids the collection or transportation of Regulated Municipal Waste generated or present within that Participating Municipality by any person who is not duly licensed by the Authority to deliver waste to the System.

(c) The County is to provide in the County Agreement that the Authority shall establish a schedule of fees for delivery of waste to the System, which fees shall be calculated on the basis of the Authority's operating costs, administrative costs and capital costs, including an amount sufficient to cover debt service, depreciation and reserves.

(d) The Authority shall be responsible for collecting all fees for the use of the System from each person delivering solid waste to the System.

(e) Any party may terminate the Intermunicipal Agreement at any time if the System should become unable to accept all Regulated Municipal Waste generated within the County and the Participating Municipalities. Unless so terminated, the Intermunicipal Agreement has a term of 40 years from its effective date in January 1987.

The County has assigned certain of its rights under the Intermunicipal Agreement to the Authority pursuant to the County Assignment.

#### County Agreement

The County Agreement includes, among other provisions, the following:

(a) During the term of the County Agreement, the County shall deliver or cause to be delivered to the System all Regulated Municipal Waste that is collected by or on behalf of the County or a Participating Municipality.

(b) The Authority shall construct and operate or arrange for the construction and operation of a facility for processing or other disposition of all Regulated Municipal Waste generated within the County and shall determine the means for obtaining financing therefor.

(c) The Authority shall establish the schedule of fees for delivery of waste to the System, which fees shall be calculated on the basis of the Authority's operating costs, administrative costs and capital costs, including an amount sufficient to cover debt service, depreciation and reserves. Consistent with the provisions of the County Agreement, the County has, in the County Waste Flow Ordinance, forbidden the collection or transportation of Regulated Municipal Waste generated or present within the County by any person who is not duly licensed by the Authority to deliver waste to the System.

(d) The Authority shall be responsible for collecting all fees for the use of the System from each person delivering solid waste to the System.

(e) The Authority shall accept all Regulated Municipal Waste generated within the County and the Participating Municipalities at the System for processing, disposal or disposition for a fee for the use of the System.

(f) The Authority shall administer and the County shall enforce the County Waste Flow Ordinance and the Waste Flow Ordinances of the Participating Municipalities, and rules and regulations promulgated thereunder.

(g) The Authority shall coordinate and administer a recycling program on behalf of the County and the Participating Municipalities.

(h) The County shall not consent to the amendment of a Waste Flow Ordinance enacted by a Participating Municipality without the Authority's consent.

(i) Either party may terminate the County Agreement at any time if the System should become unable to accept all Regulated Municipal Waste generated within the County and the Participating Municipalities. Unless so terminated, the County Agreement has a term of 40 years from its effective date in January 1987.

#### Waste Disposal Fees

Under the terms of the Intermunicipal Agreement and the County Agreement, the Authority is to establish the tipping fees to be collected from each person delivering waste to the System. Such tipping fees are to be calculated on the basis of the Authority's operating costs, administrative costs and capital costs, including an amount sufficient to cover debt service, depreciation and reserves. The Indenture includes a rate covenant of the Authority which requires the Authority to similarly fix and collect its rates, fees and charges. Under the terms of the Intermunicipal Agreement, the tipping fee is required to be uniform at each place of delivery into the System for all waste generated within Participating Municipalities. See "Security for the Series A Bonds — Rate Covenant".

In *Ridley Arms, Inc. v. Township of Ridley*, 522 A.2d 1069 (Pa. 1987), the Pennsylvania Supreme Court decided that the

fees collected from an apartment complex for refuse collection as part of the township's annual tax were unreasonable in violation of a statute authorizing the township to establish charges for such services. In this case the charges paid by the taxpayer were more than twice those imposed for collection service by a private hauler and were required to be paid although the taxpayer made no use of the township collection service and instead relied entirely on the collection service of a private hauler; the private hauler's service was performed three times a week, as compared with the township's twice weekly service; and the private hauler provided large-capacity dumpsters to the taxpayer free of charge, as compared with the township's service requiring the taxpayer to purchase and furnish its own dumpsters of lesser capacity. The Pennsylvania Supreme Court held all segments of the township's refuse collection ordinance which imposed any fees, taxes or charges void as applied to the taxpayer in that case.

The Consulting Engineer has concluded that the fees and charges which it has projected to be collected for delivery of waste to the System, for the Base Case and sensitivity cases it has examined, are reasonable with respect to the lawful disposal of Regulated Municipal Waste in Southeastern Pennsylvania. See Appendix A, "Consulting Engineer's Feasibility Report".

### REGULATION

The Authority is subject to regulation by various federal, state and local governmental agencies with respect to the conduct of its activities, including (without limitation) its receipt and disposal of municipal waste and the design, construction and operation of its facilities. Such agencies periodically have revised their regulations and procedures in a manner which has had an impact upon the Authority, and the Authority anticipates that such will continue to be the case.

The General Assembly of the Commonwealth of Pennsylvania is currently considering Senate Bill 528, which proposed legislation would further regulate the manner in which Pennsylvania municipalities and other public agencies (such as the Authority) collect and dispose of solid waste. The proposed legislation, in different versions, has been approved by both the

Pennsylvania Senate and House of Representatives. Adoption of Senate Bill 528, in either the form approved by the Senate or the House of Representatives, could have an adverse effect on the Authority's activities, specifically including the construction and operation of the Facility and the fees that would be charged for its disposal of Municipal Solid Waste. The Authority cannot predict whether Senate Bill 528 will become law or, if it becomes law, the final form of such legislation.

### THE SYSTEM

The overall solid waste management and disposal system of the Authority, including, without limitation, all equipment, real and personal property, transfer stations and landfill facilities (the "System") is the primary system for disposal of Regulated Municipal Waste in the County. The Facility, if built, and the additional landfill, the initial development of which the Authority intends to finance in part with the proceeds of the Landfill Bonds, will be integral parts of the System. The Resource Recovery Project, including the Facility and related facilities for the transmission of electricity, and the Landfill Project are being undertaken as part of the 1986 Plan, which was prepared in accordance with the requirements of the Solid Waste Management Act. The 1986 Plan advocates a balanced approach to solid waste management in Lancaster County, including recycling, the recovery of energy from the burnable portion of the non-recycled solid waste and the landfilling of the remainder.

The Series A Bonds are being issued to pay a portion of the costs associated with the Resource Recovery Project, including the Facility and related facilities for the transmission of electricity. The Facility is to be designed and constructed by the Company pursuant to the Construction Agreement and operated by or on behalf of the Company pursuant to the Service Agreement. See Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto" for summaries of the Construction Agreement and the Service Agreement. In addition, the Consulting Engineer's Feasibility Report, included as Appendix A hereto, includes a more detailed description of the Facility and additional information regarding the

waste quantities and other aspects related to the Resource Recovery Project and the Landfill Project.

### The Facility

The Facility is to be designed to receive and combust, in an economic and environmentally sound manner, 1200 tons per day of Acceptable Waste generated by residential, commercial and industrial sources in Lancaster County. The Facility will use the Martin GmbH proprietary mass burn technology which has been utilized in approximately 115 Martin facilities worldwide, including nine facilities in the United States, five of which have been constructed and are operated by Ogden companies.

Electricity generated by the Facility and not used in the operation of the Facility will be sold to Metropolitan Edison Company pursuant to the Electricity Sales Contract.

The Facility is expected to be located on a site of approximately 56 acres owned by the Authority in Conoy Township, about 20 miles west of the City of Lancaster, Pennsylvania. The site is accessible from Route 441.

Construction of the Facility will not commence until all permits needed to commence construction have been obtained. Operation will not commence until all necessary permits have been obtained. See Appendix A, "Consulting Engineer's Feasibility Report" for the current status of the permits required for the construction and operation of the Facility.

See Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto" for additional information regarding the Company and Met-Ed and for summaries of certain provisions of the Construction Agreement and the Service Agreement.

### Landfill Project

In 1986, the Authority acquired ownership of a 153 acre parcel of land adjacent to its existing landfill. The proceeds of the Landfill Bonds are to be used to refinance temporary indebtedness incurred to acquire this parcel and to pay costs for design and engineering of the landfill, construction and equipment of a leachate treatment system and construction of the first two cells

of the landfill. All permits necessary to commence construction have been obtained. See Appendix A, "Consulting Engineer's Feasibility Report" for information regarding the Landfill Project. Additional cells for landfilling at this parcel will have to be developed in the future to utilize the full capacity of this parcel and the financing for such development will have to be arranged at that time. Based on the assumptions in the Consulting Engineer's Feasibility Report included as Appendix A hereto, it is expected that the total volume of this landfill will be approximately 11 million cubic yards and that, in combination with the Authority's existing landfill, it will have a useful life of approximately 23.5 years if the Facility commences operation as contemplated and approximately 10 years if the Facility is not constructed. At the expiration of the useful life of this landfill, the Authority would be obligated under the Intermunicipal Agreement to secure an alternate disposal site.

### TAX MATTERS

In the opinion of Morgan, Lewis & Bockius, Bond Counsel, under existing law, interest on the Series A Bonds is excluded from gross income for federal income tax purposes, except that (a) any Series A Bond will be subject to federal income taxation during any period during which such bond is owned by a "substantial user" of the Facility or the Resource Recovery Project or a "related person" within the meaning of Section 147(a) of the Internal Revenue Code of 1986, as amended (the "Code"), and (b) interest on the Series A Bonds will be considered a tax preference item in calculating the alternative minimum tax imposed by section 55 of the Code on individuals and corporations and the environmental tax imposed by Section 59A of the Code on corporations.

Financial institutions will not be entitled to deduct that portion of the institution's interest expense which is allocable to interest on the Series A Bonds. The deduction otherwise allowable to property and casualty insurance companies for "losses incurred" will be reduced by an amount equal to a portion of the interest on the Series A Bonds received or accrued during any taxable year. Foreign corporations engaged in a trade

or business in the United States will be subject to a "branch profits tax" on the corporation's "dividend equivalent amount" for the taxable year, which will include interest on tax-exempt obligations such as the Series A Bonds. Certain Subchapter S corporations also may be subject to taxes on their "passive investment income", which could include interest on the Series A Bonds. Up to one-half of the Social Security benefits or railroad retirement benefits received by an individual during any taxable year will be included in the gross income of such individual if the individual's "modified adjusted gross income" (which includes interest on tax-exempt obligations such as the Series A Bonds) plus one-half of the Social Security benefits or railroad retirement benefits received by such individual during that taxable year exceeds the "base amount" described in Section 86 of the Code.

In giving the opinion set forth in the first paragraph of this section, Bond Counsel has assumed the accuracy of certain representations made by the Authority and the Company, which Bond Counsel has not independently verified, and compliance by the Authority with covenants set forth in the Tax Certificate and Agreement delivered by the Authority to satisfy certain requirements of the Code that must be satisfied subsequent to the issuance of the Series A Bonds. Attention is called to the fact that interest on the Series A Bonds may become subject to federal income taxation retroactively to the date thereof if such representations are determined to have been inaccurate or if the Authority fails to comply with such covenants.

In the opinion of Bond Counsel, under existing law, the Series A Bonds are exempt from personal property taxes in Pennsylvania, and the interest on the Series A Bonds, and any gain from the sale thereof, are exempt from Pennsylvania personal income, corporate net income and mutual thrift institution net income taxes.

Except as expressly stated in the first, second and fourth paragraphs of this section, Bond Counsel will express no opinion as to any federal or state consequences of the ownership of, receipt of interest on, or disposition of, the Series A Bonds. Holders of the Series A Bonds should consult their tax advisors with respect to such matters and as to the effect, if any, that

holding the Series A Bonds will have on the matters referred to in such paragraphs.

### LEGAL MATTERS

Legal matters incident to the authorization, issuance and sale of, and tax exempt status of interest on, the Series A Bonds will be the subject of an approving opinion of Morgan, Lewis & Bockius, Philadelphia, Pennsylvania, Bond Counsel. A copy of the substantial form of such opinion is set forth in Appendix F. Certain legal matters will be passed upon for the Underwriters by their counsel, Wolf, Block, Schorr and Solis-Cohen, Philadelphia, Pennsylvania. Certain legal matters will be passed upon for the Authority by its counsel, Hartman Underhill & Brubaker, Lancaster, Pennsylvania. Certain legal matters will be passed upon for the Company and Ogden Corporation by Ballard, Spahr, Andrews & Ingersoll, Philadelphia, Pennsylvania.

\* \* \*

Excerpts from  
**LANCASTER COUNTY  
 SOLID WASTE  
 MANAGEMENT PLAN 1986**

**EXECUTIVE SUMMARY**

The Pennsylvania Solid Waste Management Act of 1980 (Act 97) requires that each municipality with a population density of 300 inhabitants per square mile submit to the Pennsylvania Department of Environmental Resources (PADER) an officially adopted Solid Waste Management Plan. The Plan is to provide for the safe and proper storage, collection, transport, processing, and disposal of municipal waste generated within each community. The majority of the municipalities in Lancaster County have agreed to delegate this responsibility to Lancaster County or its assigned authority with the expectation that the Plan would be approved and adopted by each participating municipality.

Lancaster County is currently generating over 800 tons per day (tpd) of municipal solid waste. It is anticipated that by the year 2010 this generation rate will increase to 1,100 tpd. At present, these wastes along with the several tons of industrial residues that are produced on a daily basis are being deposited at several landfill facilities. The largest facilities in the region include the Creswell Landfill which is owned and operated by the Lancaster Area Refuse Authority (LARA) and the Lanchester Landfill near the Lancaster/Chester County border. Because the facilities are quickly reaching capacity and disposal costs are increasing rapidly, a new plan is needed. Consequently, this Plan has been produced for Lancaster County. It examines the technological, management, administrative, financial, and legislative options that are available for managing the solid waste stream, and recommends an optimal system for the storage, collection, transport, processing, and disposal of municipal solid waste.

The Plan first examines the County in terms of geographic characteristics, natural resources, governmental structure, population, economic activity, and land use. Waste generation

figures are then calculated for each sector of the population (residential, commercial, industrial, and institutional) using guidelines from the PADER and comparing these figures to actual waste stream data collected by LARA. Specific waste generation data are found in the tables at the end of Section 3.0.

After discussing the limitations of the existing waste management system in Lancaster County and identifying future needs, the Plan describes the technologies that are available for each component of the waste management system, including options for storage, collection, transfer and transport, processing, and final disposal of the solid waste stream. The technology for each component is then evaluated in terms of cost, reliability, environmental considerations, and overall suitability to the particular circumstances in Lancaster County. The available options for management, administration, and financing of the solid waste system and legislation to implement the system are described and evaluated. As a result of this evaluation, an optimum overall solid waste management system has been developed.

**SOLID WASTE SYSTEM**

The Plan proposes the construction of a mass burn water-wall processing facility which is capable of handling approximately 1,200 tpd of municipal solid waste. The heat generated by this process will be used to create steam, which in turn will be used to generate electricity. This electricity will be sold to an electric utility company, and the revenues generated by this sale will be used to offset the costs associated with the operation of the system. This facility is expected to be in full operation by 1990.

An additional key feature of the plan is the increased support to and coordination of recycling. The recovery, collection, and sale of newspapers, glass, aluminum, rags, and other recyclable materials, which is already a significant effort by several volunteer organizations in Lancaster County, will be further promoted by a full-time, paid countywide coordinator. In addition, financial support will be provided to increase the number of collection shelters, to furnish materials handling

equipment, and to meet other requirements of the organizations. Furthermore, centralized coordination and support will be provided to the marketing of the recyclable materials to obtain more stable prices through longer-term arrangements with brokers and recycling industries.

The recycling activities will be closely monitored, and if the County goals as recommended by SolWAC of 5-percent recycling by 1990, 10-percent by 1995, and increasing 1 percent per year up to 20 percent are not achieved, a program of mandatory source-separation of recyclable materials will be considered, at least for the high population density areas of the County.

The Plan also envisions the eventual construction of up to three transfer stations. The most suitable location for these stations has been determined to be near the population centers in the northwestern, northeastern, and southern areas of the County. The proposed location of the processing facility is within the central waste shed which encircles Lancaster City.

Finally, the options for disposal of the non-combustible materials, residual ash from the processing facility, and non-hazardous industrial residual wastes in Lancaster County are extremely limited. It has been determined that the landfill method is the most cost-effective alternative. Therefore, the Plan proposes that the Creswell Landfill, because of its location, its ownership by LARA, and its ability to expand, be used as the final disposal site.

It is estimated that the total cost of the waste-to-electricity facility and the transfer stations will be approximately \$125 million. Expansion of the Creswell Landfill will cost an additional \$20 million. The projected tipping fees plus the revenues resulting from the sale of the electricity are expected to cover the total anticipated capital and operating costs of these facilities.

In order to legally implement the Plan, the County must first gain control of the flow of municipal solid waste. It must encourage municipalities to adopt the Plan and also require that all waste produced in the County is processed through the County's solid waste management system. These requirements will be effected by ordinances and agreements between the

County and the municipalities and between the County and LARA, which will be the administrating agency under this Plan.

## MANAGEMENT AND ADMINISTRATION

LARA already has countywide authority for receiving, transferring, processing, and disposing municipal and residual solid wastes. The full responsibility for managing and administering this plan could be given to LARA. However, there are additional functions which need to be carried out, particularly waste flow control and coordination of recycling, which could be better performed by a new entity with the full authority and responsibility for managing solid waste and implementing this plan.

Therefore, it is recommended that LARA's articles of incorporation be amended to form the Lancaster County Solid Waste Authority (LCSWMA) by County legislation and a resolution by LARA's board pursuant to the Municipal Authorities' Act. The LCSWMA would have a 13-member Board, a full-time executive director and staff, a 15-member Citizens Advisory Committee, and four operation divisions. The four divisions would be: (1) Operations — primarily the present LARA organizations — to develop and operate or contract for the operation of, the transfer, processing, and disposal facilities; (2) Licensing and Enforcement — to ensure waste flow control; (3) Recycling — to coordinate and support the countywide effort; and (4) Planning — to monitor the system, evaluate the operations, and plan for future improvements.

## LEGISLATIVE REQUIREMENTS

It is recommended that Lancaster County enact legislation required to establish the LCSWMA, as described above. In addition, five further sets of legislation, resolutions, and agreements are required.

### Resolution Adopting the Lancaster County Solid Waste Management Plan

Each municipality agreeing to implement the Plan must pass a resolution approving and adopting the County Plan.

### Municipal Waste Flow Ordinance

Each municipality agreeing to implement the Plan must pass an ordinance which requires all municipal solid waste collectors to be licensed by the County and to deliver all wastes collected within the municipality to a designated transfer station or disposal facility.

### Lancaster County Waste Flow Ordinance

The County must pass an ordinance providing for the licensing of municipal solid waste collectors and requiring disposal of wastes only at designated transfer stations or disposal facilities.

### Agreement Between Lancaster County and the LCSWMA

The County must sign an agreement with the LCSWMA establishing the basis for providing municipal solid waste to the LCSWMA transfer station(s) and waste-to-energy facility; and LCSWMA must sign the agreement to accept, process, and dispose of the waste.

The LCSWMA must develop, establish, and publish the regulations for licensing haulers and the conditions for collection, transport and delivery of municipal and residual wastes to the Authority facilities.

### Intermunicipal Agreement

The County and each participating municipality must sign an intermunicipal agreement which authorizes the County to adopt a Waste Flow Ordinance and to commit the wastes for delivery to the LCSWMA facilities. In effect, the Intermunicipal Agreement ties together the above resolutions, agreements, and ordinances so that the municipal solid wastes are clearly designated for delivery to, and acceptance by, LCSWMA facilities. Examples of the resolutions, ordinances and agreements are provided in Appendices C through G.

### Other Municipal Ordinances

The municipalities retain the responsibility and authority to adopt ordinances controlling the storage, collection, and transportation of municipal solid wastes within their boundaries. Municipalities may enact compulsory source separation and anti-scavenging ordinances to promote recycling.

\* \* \*

### 7.8 OVERALL SYSTEM MANAGEMENT, ADMINISTRATION, AND LEGISLATION

#### 7.8.1 *Institutional Requirements for Management and Administration of the Overall County Solid Waste System*

There are three potential institutional mechanisms upon which Lancaster County could rely to construct and operate the overall County system:

1. The County could own and operate the system itself through a unit of the County government ("county department")
2. The County could rely upon an authority created pursuant to the Municipal Authorities Act, Pa. Stat. Ann. 53, §§ 301-322 (Purdon 1974 and Purdon Supp. 1985)
3. The County could seek to rely upon private entities and the private market to fulfill these needs.

Lancaster County bears a distinct advantage over many other Pennsylvania counties in that an administrative structure which could be used implement a solid waste management plan is already in place. An entity which could be primarily responsible for implementing the most crucial segments of the plan — notably construction, expansion and operation of the solid waste facilities called for by this Plan — has already been created and has been operating for a number of years. That entity, LARA, is already operating a landfill and a transfer station and is accepting waste from much of the County.

Use of LARA, with some modification, to implement the plan, bears a number of distinct advantages over creation of a County department or reliance upon private industry. The facts

that LARA (1) has an established administrative structure and staff (2) owns and operates existing facilities upon which the County will rely (3) owns sites upon which some of the future facilities will be located and has begun to prepare designs and permit applications for those sites, and (4) has an established record of providing solid waste disposal services, militates heavily in favor of relying upon LARA or a successor authority rather than on either a County department or private industry.

Use of an authority is superior to reliance upon private markets for the following:

1. Private industry is not obligated to implement a plan and, thus, one cannot be assured that planned facilities will be built on a predictable schedule.
2. Private industry lacks condemnation power and may be unable to obtain the necessary sites.
3. Public bodies can be more responsive to the wants and needs of County residents than private industry.
4. The law in Pennsylvania expresses a clear preference to public control over solid waste disposal, as expressed in the Pennsylvania Solid Waste Management Plan,<sup>1</sup> state case law,<sup>2</sup> and legislation.<sup>3</sup>

Use of an authority rather than a County department is also favored for the following reasons:

1. The County can be insulated from future liabilities arising from ownership or operation of the facilities.
2. Even more importantly, if the County decided to own and operate the solid waste facilities within the County System, itself, the County would be required to take control of LARA's existing facilities, including its landfill to

1. *Pennsylvania Solid Waste Management Plan*, Appendix E-3 "Statement of Department Attorney Attesting to the Authority of the Department," Answer to Question 3 at pp. E-3.3 to E-3.4 (April 1982).

2. *Kavanagh v. London Grove Township*, 486 Pa 133, 404 A.2d 393 (1979).

3. See Pa. Stat. Ann. tit. 53, §§ 5607, 65708 (Purdon 1974).

obtain the economics associated with unified control and operation of all necessary facilities. If the County owned or even operated these existing facilities, it would be exposed to potential liability arising from LARA's past operation of those existing facilities. That liability could be very extensive. This reason alone militates against the County taking control.

4. Borrowing the large sums of money necessary to finance construction of needed facilities may impair the County's debt limits.

5. If a County department were used, its budget would be part of the general County budget. In such case, there may be a temptation to divert revenues from tipping fees to meet the general expenses of County government and away from needed environmental improvements. Political pressures could also be exerted to keep tipping fees artificially low, such that measures necessary to protect the environment may be delayed or abandoned and the users will not bear the full control of their waste generation produces.

Accordingly, use of an existing Countywide solid waste authority to implement the "physical" (construction and operation) components of a Plan is the optimal management and administrative program (See 25 Pa. Admin. Code § 75.11(i)(13)(ii)). Having an existing implementation agency such as LARA also vastly simplifies the legislative and administrative program necessary fully to implement the proposed plan.

#### 7.8.2 Additional Functions to be Implemented

Although an Authority is the optimal administrative unit for constructing and operating the transfer, processing and disposal facilities called for in the Plan, there are a number of other functions relating to solid waste planning and implementation which might still be performed by a County department. However, as discussed below, the optimal program would incorporate as many functions as feasible into a single authority, because that authority would have the greatest solid waste expertise within the County and access to most information. As

discussed below, there are some limitations to this approach, since the powers which may be exercised by an authority are limited both by statute, *see, e.g.*, at Pa. Stat. Ann. tit. 53, § 306 and the Pennsylvania Constitution, *see, e.g.*, Pa. Const., Art. III, § 31. *Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150, 87 A.2d 474 (1952).

#### 7.8.2.1 Recycling

One of the additional functions which must be performed is recycling. As discussed above, the plan calls for the County initially to provide (1) services to coordinate volunteer and municipal efforts, (2) transportation, and (3) market coordination, with later implementation of mandatory recycling ordinances only if necessary. Although a County department could coordinate the recycling activities, there are many reasons for utilizing the same agency for providing these recycling services as provides other solid waste services. For example, a single authority could use the transfer stations called for by the Plan to be operated by the authority for recycling consolidation, processing and transfer. Vehicles and staff could also be used for both tasks, offering considerable efficiencies of scale. Utilizing the same entity would also allow maximum coordination of recycling with disposal.

There is a danger that an authority primarily geared towards waste disposal and mass burning, such as is recommended here, may de-emphasize materials recovery and emphasize energy recovery. However, this danger is minimal, since the initial recommendation of this Plan calls for the authority merely coordinating these activities rather than controlling the volunteer municipal activities. This approach meshes with that proposed in the proposed Pennsylvania Municipal Waste Planning and Resource Recovery Act (SB 1211), which would leave primary responsibility for implementing recycling programs with municipalities, but would allow County planning and coordination. In addition, the Plan calls for limitations in a proposed agreement between the authority and the County which would require the authority to maximize recycling activities.

#### 7.8.2.2 Planning

A second function which is currently not performed by LARA is solid waste planning. Although this function could continue to be performed by SolWAC or another unit of County government, it would be preferable to have the implementation authority also responsible for updating and amending the County's solid waste management plan. The authority would have best access to information crucial to planning as well as an existing staff with expertise in solid waste management and knowledge of the particular problems of solid waste management faced by the County and funds to prepare necessary plans. Moreover, making one agency responsible for planning and implementation may avoid some of the conflicts and fragmentation which have appeared during the County's present planning efforts.

Reliance upon an authority to prepare plans and make recommendations with respect to the planning both has the disadvantage of placing that responsibility with a group which is appointed but then insulated from control by elected officials. Nevertheless, the authority, at best, will be authorized to recommend a plan for approval by the County Commissioners, thereby assuring ultimate control by elected officials. Moreover, this Plan is also recommending creation of a solid waste advisory committee, such as is proposed under the Municipal Waste Planning and Resource Recovery Act (SB 1211), to provide advice to LCSWMA and to the County Commissioners with respect to future planning and plan implementation. This group would be cross-representational and would assure public input and public responsiveness. It would be, however, an advisory committee only. All staff and support functions would be provided by LCSWMA. This approach would further the overall goal of allowing all the costs of solid waste disposal to be ultimately borne by waste generators through tipping fees.

#### 7.8.2.3 Licensing and Enforcement

A third function, discussed at further length below, is that of creating a licensing system to assure waste flow. While the County or municipality must bear ultimate responsibility for enforcement of a licensing and waste flow ordinance, an authority could most efficiently administer the licensing system. LARA

already administers a dumping license system pursuant to its authority to enact rules and regulations governing use of its facilities and operation of its business. Pa. Stat. Ann. tit. 53, § 315 (Purdon 1974). This authority can allow LARA to limit access to certain categories of users (i.e., licensed collector/haulers and individual generators), dictate access routes to its facilities and direct generators from particular regions to specific facilities. A waste licensing and waste flow ordinance can simply provide that only entities licensed to dump at LARA may collect municipal waste within the County or the municipality, thus utilizing an existing licensing system and its existing administrative capabilities. For this reason, this function would best be performed by the single countywide authority.

Thus, in order to promote efficiency, to protect the County from liability, to preserve the County's ability to raise money in the future and to assure that the true cost of solid waste management is ultimately borne by the users, the optimal means for implementing this Plan is to place the maximal responsibility permitted by the law in an authority.

#### 7.8.3 *The Lancaster County Solid Waste Management Authority*

Because LARA already exists and already owns many of the facilities which will be relied upon, rather than creating a new authority, LARA may be assigned these functions. However, with these new functions, LARA should be modified as authorized by Pa. Stat. Ann. tit. 53, § 305 (Purdon 1974). Among other things, LARA's name should be changed. Lancaster Area Refuse Authority may denote an authority limited in jurisdiction to the area around Lancaster City and use of the word "refuse" may denote concern with disposal of unwanted materials rather than recovery of energy and materials as is contemplated by the present plan. Accordingly, this Plan recommends that LARA's name be amended to Lancaster County Solid Waste Management Authority ("LCSWMA"). LARA's Articles of Incorporation should also be amended to reflect LARA's new planning and recycling functions. In order to do so, LARA must adopt a resolution setting forth the proposed amendments and submit that resolution to the County, which must then adopt the

amendment by resolution or ordinance. Pa. Stat. Ann. tit. 53, § 305 (Purdon 1974).

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#### 7.8.4 *Optimal Financing and Procurement Mechanism*

The legislative program which will be necessary for implementing the Plan is largely determined by the need to secure financing for the principal component of the Plan, the proposed municipal waste incinerator for converting municipal waste into steam and electrical energy ("waste-to-energy facility" or "facility"). The very high capital costs of such a facility can be financed with private equity, general obligation debt instruments issued by the County or the County's municipalities, debt instruments secured by revenues from the Resource Recovery Facility ("Revenue Bond"), or a variety of combinations of the foregoing.

Public financing appears to be preferable to private financing because of (1) the existence of LARA, (2) the County's established tradition of public control over solid waste processing and disposal, and (3) the previously discussed preference for public control over solid waste disposal expressed in the Pennsylvania Solid Waste Management Plan, state case law, and legislation. Issuance of tax free revenue bonds by LCSWMA appears preferable to general obligation bonds because (1) the high costs of construction for a resource recovery facility could impair the County debt limits and (2) the primary implementation agency, LCSWMA, will be an authority which cannot issue general obligation bonds. These revenue bonds can be coupled with opportunities for private equity contributions from a contractor or vendor selected to supply or to operate the Facility.

##### 7.8.4.1 *Procurement and Financing Alternatives*

The Alternatives Report (GBB 1985, pp. 5-1 through 5-25 and Appendix I) discussed the risks involved in various procurement approaches and the advantages and disadvantages of financing alternatives. In particular, the Alternatives Report presented information on the following procurement methods:

1. A/E Procurements (architectural/engineering)
2. Turnkey Procurements
3. Full-Service Procurements

No procurement method was recommended, although the report noted that "Risk for the procuring agency is generally greatest under the A/E approach and least under the full-service approach. However, the least risk may carry a greater financial cost." LARA is currently investigating the procurement methods that are best suited to Lancaster County.

The Alternatives Report noted that "Waste-to-energy projects financed with revenue bonds have had limited acceptance in the financial market, and the issues have been characterized by high yields and high debt service coverage requirements . . . [T]he investment banking industry has sought to enhance project financing . . . through innovative financing techniques . . . In any case, there is still a trend toward project financing which includes some form of tax-exempt revenue bonds."

Although, as noted above, the optimal financing mechanisms will necessarily involve the issuance of some form of revenue bonds, the precise financing and procurement arrangements cannot be determined now due to the volatility of the tax laws and current financial markets. These arrangements will therefore have to be determined at a later time when the project nears reality. Recently proposed changes to Federal and State laws pertaining to public project financing may have been enacted by that time.

#### 7.8.4.2 Necessary Elements for Revenue Bond Financing

In order to make the issuance of revenue bonds feasible, the investment community requires assurance of (1) a secure site for disposal of residue and non-processibles or bypass, (2) secure contracts for sale of the energy products, and (3) control over a secure supply of solid waste sufficient to keep the facility fully operational.

#### 7.8.5 Residue Disposal

LARA owns the existing Creswell Landfill and is proposing an expansion that landfill and construction of a new landfill at the Frey Dairy Farms, Inc. site. These actions should provide sufficient capacity for residue disposal for the long-term future.

It will be necessary for LARA and its successor, LCSWMA, to assure that other waste does not impair the capacity required for disposal of residue over the life of the facility. As owner of the

landfill, LARA or LCSWMA can clearly restrict access to use (1) as a residue disposal site and (2) by County residents only. See, e.g., *Reeves v. Stake*, 447 U.S. 449 (1980); *Shayne Brothers, Inc. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *County Commissioners of Charles County v. Stevens*, 20 E.R.C. 2080 (Md. 1984); cf. *Glassboro v. Gloucester County Board of Chosen Freeholders*, \_\_\_\_ N.J. \_\_\_\_, \_\_\_\_ A.2d \_\_\_\_ (1985).

#### 7.8.6 Energy Contracts

The type and number of energy sale contracts which will be required will depend upon the siting of the Facility and the type of energy market at that site. Long term contracts will be required with one or several industrial, institutional or commercial customers (including possibly Pennsylvania Power and Light) for sale of electricity and steam (if customers can be identified). The terms of these contracts will depend upon the needs of the customer, the type of facility and the site.

The requirement for energy contracts is secondary to the other requirements, because financing for the Facility will primarily be supported by tipping fees. Energy sales serve to offset these tipping fees and are not essential for financing construction and operation of the Facility if there is adequate assurance that waste flows will be directed to the Facility regardless of the tipping fees. However, the energy contracts are crucial to minimizing costs to the users within the County.

#### 7.8.7 Options for Waste Flow Control

For the foregoing reasons, waste flow control is the key factor for securing feasible financing for the waste-to-energy facility. The investment community in general, and LARA's current investment bankers specifically will require: (1) "put or pay" contracts assuring solid waste flow to a resource recovery facility ("waste flow contracts") and/or (2) secure legal controls over waste flow, such as waste flow ordinances, statutes or franchises, requiring delivery of all waste within a given jurisdiction to the Facility ("waste flow ordinance"). Under a "put or pay contract" the waste generator or some other entity which delivers waste to the Facility guarantees that the Facility will receive a certain minimum monthly amount of waste ("Minimum Monthly Commitment") and if that Minimum Monthly Commitment is not satisfied, the guarantor must agree

to pay the Facility owner or operator for any deficit. Either waste flow contracts or waste flow ordinances will assure the monthly waste flow and revenues necessary to secure a financing.

The social and political situation within the County would appear to make the use of waste flow contracts infeasible. Currently only four municipalities, representing only approximately 15 percent of the County's population, either collect waste themselves or contract with private firms to collect waste on the municipality's behalf. Thus, the vast majority of waste within the County, including waste within the most populous municipalities, is collected by private collector/haulers pursuant to individual contracts with each individual household or business. Waste flow contracts with private collector/haulers, as opposed to municipalities, simply do not provide a secure waste flow.

Entering into a put or pay contract with a municipality would provide security of waste flow and of payment in the event a Minimum Monthly Commitment is not satisfied. First, municipalities have a better ability to assure that they can obtain waste. Municipalities are by law responsible for collection, transportation, processing and disposal of municipal waste and are given the power to implement this responsibility by Section 202 of the Solid Waste Management Act. Pa. Stat. Ann. tit. 35 §6018.202 (Purdon. Supp. 1985). Moreover, one can be relatively certain that a municipality will not be displaced by another competitor, since the municipality has the option of paying for municipal collection and disposal with municipal tax revenues and providing this as a free municipal service to its residents. Second, a municipality, with its taxing power, will continue to exist for the life of any facility.

Private collector/haulers, on the other hand, are unlikely to be able to assure that they will be able to continue to collect the amount of waste they are collecting today over the 20- to 25-year life of a resource recovery facility. Moreover, these private collector/haulers could go out of business at any time. Accordingly, contracts with the private collector/haulers who presently serve the vast majority of the County's residents are unlikely to provide a secure waste flow.

Waste flow contracts could be utilized by the County if a sufficient number of municipalities representing a sufficient percentage of the County's population were willing to collect or to contract for the collection of trash. This has been an approach used in some regions. This, however, seems unlikely to succeed in Lancaster County, because it would require convincing the majority of municipalities to enter the trash collection and transportation business, with a corresponding tax levy to pay for this service. The municipalities within Lancaster County have apparently made a decision not to do this. Accordingly, it would not only be very difficult to implement such a system, but its very suggestion could create a disincentive for municipalities to approve the proposed County plan.

Therefore, the only viable option for securing the waste flow control necessary to make financing of the resource recovery facility feasible appears to be waste flow ordinances.

#### 7.8.8 Authority to Enact Waste Flow Ordinance<sup>4</sup>

The authorization to enact waste flow ordinances is set forth in Section 202 of SWMA, which provides that "[m]unicipalities are authorized to require by ordinance that all municipal wastes generated within their jurisdiction shall be disposed at a designated facility." Pa. Stat. Ann. tit. 35, § 6018.202(c) (Purdon Supp. 1985). Section 103 of SWMA defines the term "municipality" to include "[a] city, borough, incorporated town, township or County or any authority created by any of the foregoing." *Id.*, § 6018.103. On the basis of the clear wording of the applicable statutory provision and definition, a County would appear to have the authority to enact a waste flow ordinance.

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4. Ambiguities in the Pennsylvania Solid Waste Management Act ("SWMA"), Pa. Stat. Ann. tit. 35, §§6018.101 to 6018.1003 (Purdon Supp. 1985), relating to the authority of the County to adopt a waste flow ordinance, require the somewhat complex and multiple layers of contracts and agreements described below. This situation would be remedied by legislation now pending before the General Assembly, the proposed Pennsylvania Municipal Waste Planning and Resource Recovery Act, Senate Bill 1211. However, the pendency of that legislation, which may pass before the proposed County Plan is approved by the PADER, now somewhat further complicates the situation by requiring that its proposed requirements be considered.

### 7.8.9 Ability of Municipalities to Delegate Authority to Adopt Waste Flow Ordinances

The decision not to rely upon a determination that a County has unilateral power to enact a waste flow ordinance does not necessarily mean that a County must rely upon a multitude of municipal waste ordinances.

The Intergovernmental Cooperation Act authorizes municipalities, including counties, cities of the second class, second class A and third class, boroughs, incorporated towns, townships, school districts and other similar general purpose units of government, Pa. Stat. Ann. tit. 53, § 481 (Purdon 1974), to enter into joint cooperation or intermunicipal agreements "in the exercise or the performance of their respective governmental functions, powers or responsibilities." *Id.* § 483. In order to do so, the municipalities must (1) enter into an agreement *Id.*, § 483, and (2) adopt an ordinance which delegates or transfers any functions, powers or responsibilities and specifies (a) the conditions of the agreement, (b) the duration of the term of the agreement, (c) the purpose and objectives of the agreement, (d) the manner and extent of financing of the agreement, (e) the organizational structure necessary to implement the agreement and (f) the manner in which property, real or personal shall be acquired, managed or disposed of. *Id.*, § 487.

Accordingly, the County and various municipalities can enter into an intermunicipal agreement transferring the authority to adopt and administer a waste flow ordinance to the County or another single "municipality," thereby eliminating any ambiguity with respect to municipalities which are parties to the Intermunicipal Agreement.

There is one potential restriction on the ability to utilize an intermunicipal agreement to secure waste flows for the contract. It is not clear whether an authority, such as LARA, is a "general purpose unit" of government.<sup>10</sup> It therefore may be impossible to

10. The Intergovernmental Cooperation Act further appears to limit the definition of municipalities to units of government "hereafter created by the General Assembly." Fla. Stat. Ann. tit. 53, § 481, Authorities are created by municipalities.

make LARA or LCSWMA a party to an intermunicipal agreement.

Because LCSWMA will be responsible for financing and developing the Facility, if an Intermunicipal Agreement is used, a separate agreement must be entered into between the entity which will have power over waste flow and LCSWMA to assure LCSWMA that the waste flow will be secure and to assure LCSWMA will implement the plan as proposed.

### 7.8.10 The Proper Party to Enact a Waste Flow Ordinance

Because it is possible, using the mechanisms discussed above, for either a County or a number of municipalities to adopt the necessary waste flow ordinances, the County must decide whether it would be wise to rely upon a multiplicity of municipal ordinances or a single County ordinance.

Reliance upon a number of separate municipal waste flow ordinances would require LCSWMA to enter into an agreement with each municipality which elected to enact a waste flow ordinance. This approach may be unwieldy and undesirable to implement.

First, it would be far less efficient to adopt regulations and administer a multiplicity of ordinances than a single ordinance. Second, the County ordinance would apply throughout the County, even in those municipalities which fail to adopt municipal waste flow ordinances. While a county's unilateral authority is not entirely clear, a county ordinance would present a substantial chance of obligating the entire county to deliver waste to the facility. Third, it would be more difficult for LCSWMA to enforce its contractual rights that an ordinance be enacted, enforced and not amended if it were forced to look to a variety of municipalities. Finally, the proposed Municipal Waste Planning and Resource Recovery Act (SB 1211) would grant unilateral authority to the County to enact waste flow ordinances in accordance with the County plan. It would, therefore, seem wise to draft a plan that could take advantage of this power.

A countywide ordinance would therefore be preferable to several municipal ordinances in all the foregoing respects. Although a County's authority to adopt such an ordinance may be less clear than a municipality's, any municipality which would

adopt a waste flow ordinance would probably also be willing to enter into an intermunicipal agreement. Accordingly, this plan recommends reliance upon a single countywide ordinance enforced by the County and administered by LCSWMA, coupled with safeguards to maximize the County's authority to adopt that ordinance and to minimize the possibility that the ordinance can be invalidated with respect to all or any significant portion of the County's population.

#### 7.8.11 *The Proposed Optimal Legislative Program*

The legislative program which is proposed in the Plan aims to accomplish the foregoing. It relies upon two separate agreements, an intermunicipal agreement among the municipalities within the County and an agreement between the County and LCSWMA, and two types of waste flow ordinances, a countywide ordinance and parallel municipal waste flow ordinances. As noted in Section 7.2, if County recycling goals are not met using a voluntary system, mandatory municipal or county source separation/recycling ordinances must be enacted. These ordinances would be accompanied by agreements with LCSWMA marketing and possibly picking up or processing source separated materials.

##### 7.8.11.1 *Intermunicipal Agreement*

In the Intermunicipal Agreement (Appendix F) the County and the municipalities which are parties to that agreement ("Participating Municipalities") each agree to enact parallel waste flow ordinances which must (1) require the delivery of substantially all municipal waste collected within the municipality or the County, respectively, to the County "system," (2) prohibit collection of municipal waste by any person who is not licensed to dispose of waste by LCSWMA, and (3) prohibit new competing disposal facilities and expansion of existing facilities other than facilities serving other counties. The ordinances also recognize LCSWMA's authority to enact regulations governing collection, transportation and disposal of municipal waste at LCSWMA facilities. The Intermunicipal Agreement further provides that LCSWMA will continue to administer the licensing system currently administered by LARA and the County and the Participating Municipalities will be jointly responsible for

enforcing the waste flow ordinance system when LCSWMA provides information indicating that a violation is occurring.

The County further agrees to enter into a separate agreement with LCSWMA on behalf of itself and the municipalities in order to ensure the development of the resource recovery facility by LCSWMA. The Intermunicipal Agreement therefore requires the County, in the LCSWMA Agreement, to require that LCSWMA (1) build and finance the Facility, (2) provide coordination and transportation services for the County recycling program, (3) provide planning services, (4) provide administrative services for a solid waste advisory committee, and (5) continue to administer the licensing system.

The Intermunicipal Agreement also includes a variety of terms insuring that reasonable records be kept and that LCSWMA's fees be reasonable and based upon its actual costs. In order to induce all municipalities to join in the Intermunicipal Agreement, that agreement requires the County's agreement with LCSWMA to require that a premium be charged for each ton of waste collected in a municipality within the County which fails to execute the intermunicipal agreement within 90 days of PADER approval of this plan. The proposed facilities can only be securely sized to accommodate waste from participating municipalities. Therefore a premium will be imposed which is the greater of \$1.00 per ton of an amount sufficient to compensate LCSWMA for additional costs (administrative, engineering, construction) incurred or to be incurred as a result of the municipality's not executing the agreement or executing the agreement after 90 days. The agreement will further provide that no waste may be accepted from outside of the county without the consent of the host municipality for the disposal site and that in no case will waste from outside the county be accepted if this would impair LCSWMA's ability to process and dispose of waste generated within the County. Finally the agreement will authorize LCSWMA to award a "host municipality" benefit payment or other benefits for locating a facility in a host municipality and recoup those costs through fees.

The Intermunicipal Agreement is for a term of 25 years and does not become effective until municipalities representing at least 60 percent of the population within the County have

executed the Agreement. This assures that, when the County adopts its waste flow ordinance, there will be no question of the County's authority to designate waste flows from municipalities which are expected to generate sufficient waste to make financing a Facility feasible.

#### 7.8.11.2 *County/LCSWMA Agreement*

As contemplated by the Intermunicipal Agreement, the second legislative requirement for implementing the plan is a separate agreement the County and LCSWMA ("LCSWMA Agreement") (Appendix G). Although the LCSWMA Agreement, as drafted, is contemplated to be executed by the parties before the Intermunicipal Agreement becomes effective, its 25-year term would not commence until the requisite number of municipalities with the minimum percentage of population have executed the Intermunicipal Agreement.

In many respects, the LCSWMA Agreement echoes the requirements of the Intermunicipal Agreement. In the LCSWMA Agreement, the County agrees to enact a waste flow ordinance, not to amend it during the 25-year term of the LCSWMA Agreement without LCSWMA's consent, and to bring an enforcement action when LCSWMA provides it with information indicating that a violation has occurred or is occurring.

In the LCSWMA Agreement, LCSWMA agrees to construct the Facility in accordance with the implementation schedule set forth in the County's plan, arrange for the financing of the Facility as expeditiously and prudently as feasible and in accordance with the implementation schedule and accept waste for disposal regardless of the availability of the Resource Recovery Facility. LCSWMA is authorized to enter into contracts for additional waste with third parties but may not do so if it would impair LCSWMA's ability to accept all municipal waste generated within the County. LCSWMA further agrees to provide services relating to recycling and planning, to provide administrative support for the County Solid Waste Advisory Committee ("SWAC"), and to adopt regulations for and to administer the licensing system.

The LCSWMA Agreement makes LARA responsible for collection of tipping fees and maintenance of records regarding

these fees. A schedule of tipping fees must be published for each fiscal year. The fees must be based upon operating, administrative and capital costs, including amounts sufficient to cover debt service, depreciation, reserves, and host municipality benefits. LCSWMA is required to charge uniform rates for similar types of waste and may vary rates according to the site of delivery. LCSWMA may further direct that waste from certain regions be directed to a particular facility.

The LCSWMA Agreement also includes all the requirements of the Intermunicipal Agreement relating to record keeping, maintenance of scales and prohibition of competing facilities.

The LCSWMA Agreement is conditioned upon the execution of the Intermunicipal Agreement by municipalities representing at least 60 percent of the County's population, successful completion of financing, construction and acceptance of the Facility, and the continued availability of the Facility to accept "Acceptable Municipal Waste."

#### 7.8.11.3 *County and Municipal Waste Flow Ordinances*

The municipal waste flow ordinance (Appendix D) and the County waste flow ordinance (Appendix E) are largely identical.

First, both ordinances adopt and describe the Intermunicipal Agreement in accordance with the requirements of Pa. Stat. Ann tit. 53 § 487 (Purdon 1974).

Second, they both require that only collectors licensed by LCSWMA operate within the applicable jurisdiction and require all such collectors and transporters to comply with rules and regulations enacted by LCSWMA. The ordinances provide that LCSWMA will continue to administer the licensing system, including issuance and revocation of licenses.

Third, both ordinances require disposal of all Acceptable Municipal Waste generated within the applicable jurisdiction to occur at sites designated by the County or LCSWMA, with the exception of waste which is source separated or recycled. Private waste processing and disposal facilities are generally prohibited with the exception of certain "existing facilities," which may continue receiving solid waste from sources which the existing facility specifically identifies in a notice which must be submitted within 60 days of the effective date of the ordinance. Existing

facilities are, however, prohibited to expand, except to facilities owned by another County if that expansion is consistent with a PADER approved municipal waste management plan. This assures that the County ordinance will not bring the County into a conflict with Chester County with respect to the Lanchester Landfill. The exemption of existing facilities would also apply to facilities such as hospital incinerators or institutional incinerators. These exceptions for existing facilities will not only protect the ordinances from certain constitutional challenges, but will also prevent unintended results (i.e., prohibition of incinerators for infectious or pathological waste).

In order to protect against certain other constitutional challenges, the ordinances also provide that they will not interfere with existing contracts. However, the ordinances require that any new contracts be consistent with the ordinances.

The ordinances set forth various unlawful activities and allow imposition of up to a three hundred dollar fine or imprisonment in lieu thereof, and revocation and denial of licenses, for violation of the ordinance.<sup>11</sup> Violations of the ordinances are declared to be public nuisances, and the ordinances authorize injunctive actions. The County and the municipalities which have enacted parallel ordinances are authorized jointly to enforce their respective ordinances. LCSWMA may revoke its licenses for violations of the ordinances.

The municipal waste flow ordinance differs from the County waste flow ordinance principally in the respect that the municipal ordinance specifically authorizes the County to adopt the County Ordinance. The County ordinance further provides that regulations concerning standards and procedures for licensing, license fees, terms of licenses, general procedures, record keeping, transportation routes and any other matters relating to licensing and use of LCSWMA facilities may be adopted by LCSWMA pursuant to Pa. Stat. Ann. tit. 53, § 314 within initial

11. It should be noted that the definition of "person," like the definition of "person" in SMWA, Pa. Stat. Ann. tit. 35 § 6018.103 (Purdon Supp. 1985), includes officers and directors of corporations, thereby making officers and directors of corporations subject to these penalties.

regulations to be adopted no later than 180 days prior to the date upon which the Resource Recovery Facility becomes fully operational.

Finally, the County ordinance includes a severability clause which provides that if the ordinance is invalidated with respect to any portion of the County, such invalidity will not affect the ordinance's applicability to other parts of the County. Thus, if the ordinance is invalidated in a non-participating municipality, it would remain in force in all Participating Municipalities.

These overlapping agreements and ordinances will thus provide the assured waste flow required for financing. They provide incentives for municipal participation and give the County and LCSWMA considerable flexibility in making the arrangements to finance and develop the Facility.

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